THE THIRD PART OF THE INSTITUTES

Of the Laws of *England*:

CONCERNING

High Treason, and other Pleas of the Crown, and Criminall causes.

ECCLES. 8.11.

Quia non profertur cito contra malos sententia, absque timore ullo filii hominum perpetrant mala.

Inertis est nescire quod sibi liceat.

Authore Edw. Coke *Milite, I.C.*

Hac ego grandævus posui tibi, candide Lector.

MDCXLIV.

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Walter Moyle.

A

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Multi multa, nemo omnia novit.

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DEO,

PATRIÆ,

TIBI.

A Proeme to the third Part of the Inſtitutes.

IN the ſecond part of the *Inſtitutes* we have ſpoken onely of Acts of Parliament, (*viz.*) of *Magna Carta*, and many ancient and other Acts of Parliament, which we have explained, and therein obſerved which of them are declaratory of the ancient Lawes of this Realme, which are introductory of new, and which mixt: All of them (excepting a very few) concerning *Common Pleas*, and theſe two great Pronouns, *Meum* and *Tuum*.

In this Third part of the *Inſtitutes*, we are to treat *De malo*, viz. of *High Treaſon*, and other *Pleas of the Crowne*, and Criminall Cauſes, moſt of them by Act of Parliament, and ſome by the Common Law: in which Caſes the Law of all other is moſt neceſſary to be knowne, becauſe it concerneth the ſafety of his Majeſtie, the quiet of the Commonwealth, and the life, honour, fame, liberty, blood, wife, and poſteritie of the party accuſed, beſides the forfeiture of his lands, goods, and all that he hath: for it is truly ſaid of theſe Laws, *Reliquæ leges privatorum hominum commodis proſpiciunt, hæ regiæ majeſtati, ſubditorum vitæ, ac publicæ tranquillitati conſulunt*. And that in theſe Caſes the ancient Maxime of the Law principally holdeth, *Miſera ſervitus eſt, ubi jus eſt vagum, aut incognitum*. And where ſome doth object againſt the lawes of *England*, that they are darke and hard to be underſtood, we have ſpecially in theſe and other parts of the *Inſtitutes* opened ſuch windowes, and made them ſo lightſome, and eaſie to be underſtood, as he that hath but the light of nature, (which *Solomon* calleth the candle of Almighty God, *Prov.* 20. 27.) adding induſtrie and diligence thereunto, may eaſily diſcerne the ſame. And that may be verified of theſe Lawes, that *Lex eſt lux*, Prov. 6. 23. the Law it ſelfe is a light. See *Rom.* 2. 14. And when we conſider how many acts of Parliament (publiſhed in print) that have made new treaſons and other capitall offences, are either repealed by generall or expreſſe words, or expired: How many Indictments, attain-

See the 1. part of the Inſtitutes Sect. 500.

Malum non habet efficientem, ſed deficientem cauſam. Evill hath not an efficient, but a deficient cauſe, by reaſon of the want of ſome vertue or notable good.

Stamford

ders of treaſons, felonies, and other crimes, which are not warrantable by law at this day: And how few Book-caſes there have been publiſhed of treaſons, (though a ſubject of greateſt importance) & thoſe very ſlenderly reported: We in reſpect of the places which we have holden, and of our own obſervation, and by often conferences with the Sages of the law in former times concerning criminall cauſes or *Pleas of the Crowne*, have thought good to publiſh this Third part of the *Inſtitutes*, wherein we follow that old and ſure rule, *Quod judicandum eſt legibus, et non exemplis*. A worke arduous, and full of ſuch difficultie, as none can either feele or beleeve, but he onely which maketh tryall of it. And albeit it did often terrifie me, yet could it not in the end make me deſiſt from my purpoſe; (eſpecially in this worke) ſo farre hath the love and honour of my country, to paſſe through all labours, doubts and difficulties, prevailed with me.

This, as other parts of the *Inſtitutes*, wee have ſet forth in our Engliſh tongue, not onely for the reaſons in the Preface to the firſt Part of the *Inſtitutes* alledged, which wee preſume may ſatisfie any indifferent and prudent reader: but ſpecially this Treatiſe of the *Pleas of the Crowne*, becauſe, as it appeareth by that which hath been ſaid, it concerneth all the ſubjects of the realme more neerly by many degrees, then any of the other. Hereunto you may adde that which *Robert Holcoth* an Engliſh man ſurnamed *Theologus magnus*, upon the ſecond Chapter of the book of *Wiſdome*, in or about the 20. yeare of King *E.* 3. wrote to this effect. *Narrant hiſtoriæ quod cum* Willielmus *dux* Normannorum *regnum* Angliæ *conquiſiviſſet, deliberavit quomodo linguam* Saxonicam *poſſit deſtruere, &* Angliam, *&* Normanniam *in idiomate accordari, & ideo ordinavit, quod nullus in curia regia placitaret niſi in Gallico, & iterum quod puer quilibet ponendus ad literas addiſceret Gallicũ, & per Gallicum Latinum, quæ duo uſque hodie obſervantur. Hæc ille.* But the ſtatute of 35 *E.* 3. cap. 15. made not long after *Holcoth* wrote, hath taken theſe edicts of a Conqueror away, and given due honour to our Engliſh language, which is as copious and ſignificant, and as able to expreſſe any thing in as few and apt words, as any other native language, that is ſpoken at this day. And (to ſpeake what we think) we would derive from the Conqueror as little as we could.

Bal. cont. 3. fo. 148.

35 E. 3. ca. 15.

When *Henry* the firſt died, all the iſſue male of the Conqueror, and of his ſonnes were dead without iſſue male.

The wife of King *H.* 1. was *Mawde* daughter of *Malcolme* King of *Scotland* ſurnamed *Canmor*, and of *Margaret* his wife, who was the granchild of *Edmond Ironſide* King of *England*. *viz.* The ſaid King *Edmond* had iſſue *Edward* ſurnamed the *Outlaw*, becauſe he lived a long time beyond ſea with *Salamon* King of *Hungary* out of the extent of the lawes of this Realme. *Edward* had iſſue the ſaid *Margaret* his eldeſt daughter, famous for her piety and vertue; ſhe had iſſue *Mawde* wife of King *H.* 1. who by her had iſſue *Mawde*, of whoſe Engliſh blood by *Geffery Plantagenet* Earle of *Anjou* all the Kings of England are lineally deſcended.

We have in this Third part of the *Inſtitutes* cited our ancient Authors, and bookes of the Law, *viz. Bracton*, *Britton*, the *Mirror* of *Iuſtices*, *Fleta*, and many ancient records, never (that we know) before publiſhed, to this

this end, that seeing the *Pleas of the Crown* are for the most part grounded upon, or declared by statute Lawes, the studious Reader may be instructed what the Common Law was before the making of those statutes, whereby he shall know, whether the statutes were introductory of a new law, declaratory of the old, or mixt, and thereby perceive what was the reason and cause of the making of the same, which will greatly conduce to the true understanding thereof.

We shal first treat of the highest, and most hainous crime of *High Treason*, *Crimen læsæ Majestatis*; and of the rest in order, as they are greater and more odious then others.

CAP. I.

Of High Treaſon.

By the ſtatute of 25 E. 3. De proditionibus, is declared in certaine particular Caſes, what offences ſhall be taken to be Treaſon, with this reſtriction, That if any other caſe ſuppoſed to be treaſon ſhould happen before any Juſtices, the Juſtices ſhould tarry without going to iudgement of the treaſon, till the caſe be ſhewed before the King and his Parliament, whether it ought to be adiudged treaſon or other felony: therefore we will lay our foundation upon, and begin with that Act of Parliament, the Letter whereof in proprio idiomate enſueth. 25 E.3.cap.2.

*AVxint pur ceo que divers opinions ount eſtre eins ceux heures quen caſe doit eſtre dit treaſon, & en quel caſe nemi, le roy a le requeſt des ſeigniours & commons ad fait declariſment que enſuiſt. Ceſtaſſavoire, quant home fait compaſſer ou imaginer la mort noſtre ſeignior le roy, madame ſa compaigne, ou de lour fitz eigne & heire, Ou ſi home violaſt la compaigne le roy, ou leigne file le roy nient marie, ou la compaigne leigne fitz & heire le roy. Ou ſi home leve guerre enconter noſtre ſeignior le roy en ſon realme, ou ſoit aidant as enemies noſtre dit ſeignior le roy en ſon realme, donnant a eux aid, ou comfort en ſon roialme, ou per aylours, & de ceo provablement ſoit attaint de overt fact per gents de lour condition. Et ſi home counterface le grand, ou privie Seale le roy, ou ſa monye. Et ſi home appert faux money en ceſt roialme counterfait al mony dangliterre, ſicome la mony appelle * Luſheburgh, ou auter ſembleble a la dit mony dangliterre, ſachant le money eſtre faux, pur merchander ou payment faire en diſceite noſtre dit ſeignior le roy & de ſon people. Et ſi home tuaſt Chancelor, Treaſurer, ou Iuſtices noſtre ſeignior le roy del un Banke ou del auter, Iuſtices in Eire & daſſiſes, et touts auters Iuſtices aſſignes de Oier & Terminer * eſteaunts en lour places en feſants lour offices. Et ſoit a entendre que les caſes ſuiſnomes doit eſtre adjudge treaſon, que ſe extent a noſtre ſeignour le roy & ſa roiall Majeſtie: Et de tiel manner de treaſon la forfeiture des eſcheates appertenont a noſtre ſeignior le roy, cibien des terres & tenements tenus des auters, come de luy meſme.*

Divers opinions. *Ad fuit Declariſement.* *Nota*, This is a Law for the moſt part *Declaratory*, but addeth alſo divers things to the ancient Law.

* *Luſheburghs*, alias *Luxenburghs* were a kinde of baſe Coine to the likeneſſe of our Engliſh money, ſo called, becauſe they were coined in *Luſheburgh*, which ſometime was an Earledome, and after a Dukedome. See *Chaucer* in the Prologue to the Monks Tale, the Hoſt ſpeaking to a luſty Monk, ſaith, *God wot, no Luſhburghes pay ye*, that is (upon the coherence of the Verſe) No payment make ye that is not full and currant.

* *Injuria illata judici ſeu locũ tenenti regis videtur ipſi Regi illata, maxime ſi fiat, in exercente officium.*

Item WHereas divers opinions have been before this time, in what Caſe Treaſon ſhall be ſaid, and in what not; the King at the requeſt of the Lords and of the Commons, hath made a Declaration in the manner as hereafter followeth: That is to ſay, When a man doth compaſſe or imagine the death of our Lord the King, of my Lady his Queene, or of their eldeſt ſonne and Heire: or if a man doe violate the Kings Compagnion, or the Kings eldeſt daughter unmarried, or the wife of the Kings eldeſt ſonne and heire: Or if a man doe levie warre againſt our Lord the King in his Realme, or be adherent to the Kings enemies in his Realme, giving to them aide and comfort in the Realme or elſewhere, and thereof be provably attainted of open deed by people of their condition. And if a man counterfeit the Kings great or privie Seale, or his money: and if a man bring falſe money into this Realme counterfeit to the money of England, as the money called Luſheburgh, or other like to the ſaid money of England, knowing the money to be falſe, to merchandize or make payment, in deceipt of our ſaid Lord the King and of his people. And if a man ſlay the Chancellor, Treaſurer, or the Kings Juſtices of the one Bench or the other, Juſtices in Eire, or Juſtices of Aſſize, and all other Juſtices aſſigned to heare and determine, being in their place doing their offices. And it is to be underſtood, that in the caſes above rehearſed, it ought to be judged Treaſon, which extend to our Lord the King and his Royall Majeſtie: And of ſuch Treaſon the forfeiture of the eſcheates pertaineth to our Lord the King, as well of the lands and tenements holden of others, as of himſelf.

And albeit nothing can concerne the King, his Crowne, and Dignity, more then Crimen læſæ Majeſtatis, High Treaſon: Yet at the requeſt of his Lords and Commons, the bleſſed King by authority of Parliament made the Declaration, as is above-ſaid: and therefore, and for other excellent lawes made at this Parliament, this was called Benedictum Parliamentum, as it well deſerved. For except it be Magna Charta, no other Act of Parliament hath had more honour given unto it by the King, Lords ſpirituall and temporall, and the Commons of the Realme for the time being in full Parliament, then this Act concerning Treaſon hath had. For by the Statute of 1 H. 4. cap. 10. reciting that where at a Parliament holden 21 R. 2. divers paynes of treaſon were ordained by Statute, in as much as there was no man did know how to behave himſelfe, to doe, ſpeak, or ſay, for doubt of ſuch paines. It is enacted by the King, the Lords and Commons, that in no time to come any treaſon be iudged otherwiſe, then it was ordained by this Statute of 25 E. 3. The like honour is given to it by the Statute of 1 E. 6. cap. 12. and by the Statute of 1 Ma. cap. 1. Seſſ. 1. different times, but all agreeing in the magnifying and extolling of this bleſſed Act of 25 E. 3. Of this Act of 1 Mariæ, we ſhall ſpeak more hereafter. But to proceed to give a light touch how other Acts of Parliament have been called.

1 H. 4. cap. 10.

1 E. 6. cap. 12.
1 Mar. cap. 1. Seſſ. 1.

The Parliament holden at Oxford An. 42 H. 3. was called Inſanum Parliamentum. 12 E. 2. the Parliament of Whitebands, Albarum Fibularum or Metellarum. 5 E. 3. Parliamentum bonum. 10 R. 2. Parliamentum quod fecit mirabilia, that wrought wonders. 21 R. 2. Magnũ Parliamentũ. 6 H. 4. Parliamentũ indoctũ, Lack-learning Parliament. 4 H. 6. Parliamentũ Fuſtiũ, the Parliament of Bats. The Seſſion of Parliament in An. 14 H. 8. called the Black Parliament. The Act of 1 E. 6. was called Parliamentũ pium, the pious Parliament. And the ſaid Act of 1 Mar. Parliamentũ propitium, the mercifull Parliament. The Parliaments of Queen Elizabeth ſtiled Pia, juſta, & provida. The Parliament holden Anno 21 of King James, called Fœlix Parliamentum, the happy Parliament,

ment. And the Parliament holden in the third yeare of our Soveraigne Lord King Charles, Benedictum Parliamentum, the bleſſed Parliament. The ſeverall reaſons of theſe former Appellations appeare of Record and in Hiſtory, and the latter are yet freſh in memory. At the making of the Statute of 25 E. 3. the High Courts of Juſtice were furniſhed with excellent men, viz. Sir William Shardſhill Knight, (ſhortly written in bookes Shard) Lord Chiefe Juſtice of the Kings Bench, and his Compagnions Juſtices of that Court; Sir John Stonor Knight, commonly written in books Stone, Lord Chiefe Juſtice of the Court of Common Pleas, and his Compagnions Juſtices of that Court; and Gervaſius de VVilford, Lord Chiefe Baron of the Exchequer, men famous in their profeſſion, and excellent in the knowledge of the Lawes. At the making of the Statute of 1 H. 4. were Sir VValter Clopton Knight, Lord Chiefe Juſtice of the Kings Bench, and his Compagnions Juſtices of that Court; and Sir VVilliam Thirning Knight, Lord Chiefe Juſtice of the Court of Common Pleas, and his Compagnions Juſtices of that Court; and Sir John Caſſie Knight, Lord Chiefe Baron of the Exchequer; men equall to any of their Predeceſſors in the knowledge of the Lawes. At the making of the Statute of 1 E. 6. were Sir Richard Liſter Knight, Lord Chiefe Juſtice of the Kings Bench, and his Compagnions Juſtices of that Court; and Sir Edward Montague Knight, Lord Chiefe Juſtice of the Court of Common Pleas, and his Compagnions Juſtices of that Court; and Sir Roger Cholmeley Knight Lord Chiefe Baron of the Exchequer; men of that excellency, as they were worthy of the name of The Worthies of the Law. At the making of the Statute of 1 Mar. were Sir Thomas Bromley Knight, Lord Chiefe Juſtice of the Kings Bench, and his Compagnions Juſtices of that Court; and Sir Richard Morgan Knight, Lord Chiefe Juſtice of the Court of Common Pleas, and his Compagnions Juſtices of that Court; and Sir D. Brook Knight, Lord Chiefe Baron of the Exchequer, men renowned for their great knowledge and iudgement in their profeſſion. All theſe we have named in the honour of them, and of their Families and Poſterities, for that they in their ſeverall times were great furtherers of theſe excellent Lawes concerning Treaſon. In memoria æterna erit juſtus. And all this was done in ſeverall ages, that the faire Lillies and Roſes of the Crowne might flouriſh, and not be ſtained by ſevere and ſanguinary Statutes. But let us come to the Act it ſelfe, and for the better underſtanding thereof, and of the Book-Caſes, and other Records grounded upon the ſame: Let us divide this Act concerning High Treaſon into ſeverall Claſſes or Heads, and then proſecute the ſame in order.

The firſt concerneth Death,
- By compaſſing or imagining the death of the {King, Queene, Prince.} and declaring the ſame by ſome overt deed.
- By killing and murdering of the {Chancellor, Treaſurer, Juſtices of the one Bench or other, Juſtices in Eyre, Juſtices of Aſſize, Juſtices of Oier and Terminer, &c.} In their places doing their offices.

The ſecond concerneth Violation, that is, To Violate, or Carnally to know
- The Kings Conſort, or Queene.
- The Kings Eldeſt Daughter unmarried,
- The Princes VVife.

The third is Levying war againſt the King.

The

The fourth is adhering to the Kings enemies within the Realme, or without, and declaring the ſame by ſome overt act.

The fifth is counterfeiting of { The Great Seale. / The Privie Seale. / The Kings Coyne. }

The ſixth and laſt, by bringing into this Realme counterfeit money to the likeneſſe of the Kings Coine, &c.

So as Treaſon is Membrum diviſum, and theſe ſeverall Claſſes or Heads are Membra dividentia. And if the offence be not within one of theſe Claſſes or Heads, it is no Treaſon.

¶ Treaſon] is derived from [trahir] which is treacherouſly to betray. Trahue, Betrayed, and Trahiſon, per contractionem, Treaſon, is the betraying it ſelfe.

Detegit imbelles animos, nil fortiter audens
Proditio.

Inter leges Canuti fo.118.ca.61. Proditiones (hlapopb ypice) numerabantur inter ſcelera jure humano inexpiabilia. Treaſon is divided into two parts, viz. High Treaſon, Alta proditio, and into Petit Treaſon, Proditio parva. The Latin word uſed in Law is Proditio (à Prodere) and thereof cometh Proditorie, which of neceſſity muſt be uſed in every Indictment of Treaſon, and cannot be expreſſed by any other word, Periphraſis, or Circumlocution.

¶ Ad fait Declariſement.] This Law is for the moſt part Declatory of the ancient Law, and therefore this word (Declariſement) is uſed. But yet the ſtudious Reader ſhall obſerve, that in divers Clauſes it addeth to the former Law, whereunto this word (Declariſement) will ſufficiently extend.

¶ Quant Home, &c.] This extendeth to both Sexes, Homo including both Man and Woman. This Act is generall, and therefore extendeth to ſome perſons which claimed a priviledge to be exempted from Secular Juriſdiction. (For example,) [a] Adam de Orleton Biſhop of Hereford was indicted of High Treaſon for aiding the Mortimers, &c. with Men, and Armour againſt King E. 2, &c. Whereupon he was arraigned, and alledged Se abſque offenſa Dei, & Sanctæ Eccleſiæ, & abſque licentia Domini ſummi Pontificis non poſſe nec debere reſpondere in hac parte. And thereupon the Archbiſhop of Canterbury, York, and Dublin, and their Suffragans came to the Barre, claimed his priviledge, and took him away; and he was ſo far from puniſhment, as he was after tranſlated to Worceſter, and after to Wincheſter. But this Statute (to cleare all doubts) extendeth to all perſons, * as well Eccleſiaſticall as Temporall, and ſo hath it ever ſince been put in execution, as hereafter in divers Caſes it appeareth. See hereafter Cap. Murdre & Larceny.

A Man that is non compos mentis, as ſhall be ſaid more fully hereafter in the next Section, or an Infant within the age of diſcretion is not (un home) within this Statute; for the principall end of puniſhment is, That others by his example may feare to offend, Ut pœna ad paucos, metus ad omnes perveniat: But ſuch puniſhment can be no example to Mad-men, or Infants that are not of the age of Diſcretion. And God forbid that in Caſes ſo penall, the Law ſhould not be certaine; and if it be certaine in caſe of Murder and Felony, à fortiori, it ought to be certaine in caſe of Treaſon.

If a man commit Treaſon or Felony and confeſſeth the ſame, or be thereof otherwiſe convict, if afterward he become De non ſane memorie (qui patitur exilium mentis) he ſhall not be called to anſwer: Or if after judgement he become De non ſane memorie, he ſhall not be executed, for it cannot be an example to others.

And all Aliens that are within the Realme of England, and whoſe Sove-

raignes

[a] Rot. Romana. 17 E. 2. m. 6. Rot. Clauſ. 1 E. 3. part. 1. memb. 13. Artic. Cleri. 9 E. 3. cap. 15. & 16. Tr. 21 E. 3. coram Rege Rot. 173. *Privilegium ſecularе non competit ſeditioſo equitanti cum armis, &c. ſecundum leges eccleſiæ.* 25 E. 3. ſtat. 1. cap. 4. which was before this Act. Mich. 31 E. 3. coram Rege Rot. 55. Buck. Abbot de Miſſeny. See in the Chap. of Clergy in what caſes the priviledge of Clergy is taken away.

* To perſons Eccleſiaſticall and Temporall. Bract. lib. 3. 120 121. 134, 135. Britton. 5. 18. Fleta. cap. 23. 30. Mirror. cap. 1. §. cap. 2. §. 11. de appeale de homicide. 3 E. 3. cor. 383. 25 E. 3. 42. cor. 139. 26 aſſ. 27. 3 H. 7. cap. 1. 3 H. 7. 1. 12. 21 H. 7. 31. 1. Mar. Dier. 104. Tr. 32 E. 1. Coram Rege. 15, 8 E. 2. Corone. 369. 395. Cuſtum. de Norm. cap. 79. fo. 94, 95. 33 H. 8. cap. 20. 1 & 2 Mar. c. 10. To Aliens.

raignes are in amity with the King of England, are within the protection of the King, and doe owe a locall obedience to the King, (are homes within this Act) and if they commit High Treaſon againſt the King, they ſhall be puniſhed as Traytors, but otherwiſe it is of an Enemy, whereof you may reade at large, Lib. 7. Calvins Caſe, fol. 6, &c. & 17, &c.

℄ Fait Compaſſer.] Let us ſee firſt what the compaſſing or imagining the death of a Subiect was before, and at the time of the making of this Statute, [a] when Voluntas reputabatur pro facto. And [b] Bracton ſaith, that Spectatur voluntas & non exitus, & nihil intereſt utrum quis occidat, aut cauſam mortis præbeat. So as when the Law was ſo holden, he muſt cauſam mortis præbere, that is, declare the ſame by ſome open deed tending to the execution of his intent, or which might be cauſe of death, as Juſtice [c] Spigurnel reporteth a Caſe adiudged; That a mans wife went away with her Adowterer, and they [d] Compaſſed the death of the Husband, [e] as he was riding towards the Seſſions of Oier and Terminer and Gaole-delivery, they aſſaulted him and ſtroke him with weapons, that he fell downe as dead, whereupon they fled; the Husband recovered and made Hue and Cry, and came to the Seſſions and ſhewed all this matter to the Juſtices, and upon the Warrant of the Juſtices, they were taken, indicted, and arraigned; and all this ſpeciall matter was found by Verdict; and it was adiudged that the man ſhould be hanged, and the woman burnt. And Sir William Beresford Chiefe Juſtice of the Common Pleas ſaid, That before him and his Compagnions Juſtices of Oier and Terminer and Gaole-delivery, a Youth was arraigned, for that he would have ſtolne the goods of his Maſter, and came to his Maſters bed, where he lay aſleepe, and with a knife attempted with all his force to have cut his throat; and thinking that he had indeed cut it, he fled, whereupon the Maſter cried out, and his Neighbours apprehended the youth; and all this matter being found by ſpeciall Verdict, in the end he was adiudged to be hanged, &c. Quia * voluntas reputabitur pro facto. So as it was not a bare compaſſing or plotting of the death of a man, either by word, or writing, but ſuch an overt deed, as is aforeſaid, to manifeſt the ſame. So as if a man had compaſſed the death of another, and had uttered the ſame by words or writing, yet he ſhould not have died for it, for there wanted an overt deed tending to the execution of his compaſſing. [e] But if a man had imagined to murder, or rob another, and to that intent had become Inſidiator viarum, and aſſaulted him, though he killed him not, nor took any thing from him, yet was it felony, for there was an overt deed. But in thoſe dayes, in the Caſe of the King, if a man had compaſſed, or imagined the death of the King (who is the Head of the Common-wealth) and had declared his compaſſing, or imagination by words or writing, this had been High Treaſon, and a ſufficient overture by the ancient Law. And herewith agree all our ancient Books. Glanvil ſaith, Cum quis de morte Regis, &c. infamatur, &c.

Bracton in the title De criminibus læſæ majeſtatis. Ipſe accuſatus præloquutus fuit mortem regis. And Britton, fol. 16, Grand treaſon eſt a compaſſer noſtre mort, and fo. 39. b. Cy face lenenſor ſon appeale &c. que il oya meſme cēi Iohn pur parler tiel mort, ou tiel treaſon &c. And Fleta ſaith in his title De crimine læſæ majeſtatis, Si quis mortem regis auſu temerario machinatus fuerit &c. quamvis voluntatem non perduxit ad effectum. And the Mirror ſaith, Crime de majeſtie eſt un peche horrible fait al roy &c. p ceux q̄ occirent le roy, ou compaſſant a faire. And it will delight you (in reſpect of reverend antiquity) to heare a preſident of an appeale (which then and after was in uſe) of high treaſon, en pleine pliaſn &c. en temps roy Edmond en ceſtes parolx. Rocelyn icy dit vers Waligrot illonq̄ q̄ a tiel iour tiel anne del raigne de tiel roy, en tiel lieu vient celuy Waligrot a cēi Rocelyn, et luy trova deſtre en company, et en aide enſemblement ove Atheling, Thurkild, Ballard, et autres de faire priſoner, ou en tache pur occire nrē ſeignior le roy Edmond, ou en auter manner p̄ compe felonioufment, et a ceo faire fuer' entreinres a ceo counſel celer, et a ceo felony iſſint fornir ſolonq̄ lour poier. By all which it is manifeſt, that compaſſing, machinating, counſelling, &c.

℄ to

[a] See hereafter, cap. 73. Where & how *Voluntas reputabatur pro facto*, by the ancient law, and the change thereof.

[b] Bracton, fol. 115 E. 2. tit. Cor. 383.

[d] Note this word [*compaſſed.*]

* *Sed hæc voluntas non intellecta fuit de voluntate nudis verbis, aut ſcriptis propalata, ſed mundo manifeſtata fuit per apertum factum, Id eſt, cum quis dederat operam, quantum in ipſo fuit, ad occidendū, & ſic de ſimilibus.*

[e] *Inſidiator viarū.* See hereafter, ca. 5. De Hereſie. 25 E. 3. 42. 27. aſſ. P. 38. 4 H. 4. ca. 2. 13 H. 4. 7. per Gaſcoign. But ſee 9 E. 4. fo. 26. *Inſidiator viarum* without taking of ſomewhat, reſolved to be no felony. V. lib. 11. fo. 29. b. Al. Poulters Caſe. Vid. poſtea cap. 16. Robbery, in fine. Glanvil. lib. 14. cap. 14. lib. 1. c. 2. Bract. lib. 3. f. 118 Britton fol. 16. & 39. b. Note the word *Compaſſe.* Fleta lib. 1. c. 21. Mirr. cap. 1. §. 5. cap. 2. §. 11. Note this word *Compaſſe.* Mirror c. 2. §. 11. De lappeale de Majeſtie. Rot. pat. 25 E. 3. part 1. m. 16. Vide Mic. 4 H. 4. Coram Rege. Rot. 22. See hereof more in the 57 Cha. of Appeales. Bracton, Britton, Fleta, &c.

to kill the King, though it hath no other declaration thereof but by words, was High-treason by the Common law. And see hereafter, verb. per overt fait, et de ceo provablement, &c.

¶ Fait compasser ou imaginer] So as there must be a compassing or imagination, for an Act done per infortunium, without compassing, intent, or imagination: is not within this Act, as it appeareth by the expresse words thereof. Et actus non facit reum, nisi mens sit rea. And if it be not within the words of this Act, then by force of a clause hereafter, viz. Et pur ceo que pluisors auters, &c. It cannot be adiuged treason, untill it be declared treason by Parliament, which is the remedie in that case, which the makers of the law provided in that case. This compassing, intent, or imagination, though secret, is to be tryed by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour evermore for the safety of the King. This was the case of Sr. Walter Tirrel a French Knight, who the first day of August Ann. 13 Williel. 2. Ann. dom. 1100 being a hunting with the King in the new forest, was commanded by the King to shoot at a Hart, Exiit ergo telum volatile, et obstante arbore in obliquum reflexum faciens, per medium cordis regem sauciavit, qui subito mortuus corruit.

Regula.

Mar. Par. pa. 51. Holling. pa. 26. b. Mar. Westm. W. Malmesbury.

It appeareth also by the Custumer of Normandy treating of treason, and the exposition of the same, that this act was not treason. To calculate or seek to know by setting of a figure or witchcraft, how long the King shall raigne or live, is no treason, for it is no compassing, or imagination of the death of the King, within this statute of 25 E. 3. And this appeareth by the iudgement of the Parliament in 23. Eliz. whereby this offence was made felony during the life of Queen Eliz. which before was punishable by fine and imprisonment.

Custum. de Nor. cap. 14. Vide inter Indictamenta de 17 E. 4. de Th. Burdit ar. sed judicandum est legibus, & non exemplis. 23 Eliz. cap. 2.

The ancient law was, that if a mad man had killed or offered to kill the King, it was holden for treason; and so it appeareth by King Alfreds law before the Conquest, and in lib. 4. in Beverlyes case. But now by this statute and by force of these words, Fait compasser ou imaginer la mort, he that is non compos mentis and totally deprived of all compassings and imaginations, cannot commit High Treason by compassing or imagining the death of the King: for furiosus solo furore punitur: but it must be an absolute madnesse, and a totall deprivation of memorie. And this appeareth by the statute of 33. H. 8. for thereby it is provided, that if a man being Compos mentis commit High Treason, and after accusation, &c. fall to madnesse, that he might be tryed in his absence, &c. and suffer death, as if he were of perfect memory: for by this statute of 25 E. 3. a mad man could not commit High Treason. It was further provided by the said Act of 33 H. 8. that if a man attainted of treason became mad, that notwithstanding he should be executed; * which cruell and inhumane law lived not long, but was repealed, for in that point also it was against the common law; because by intendment of law the execution of the offender is for example, ut pœna ad paucos metus ad omnes perveniat, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others.

*Inter leges Alvredi. cap. 4. Lib. 4. fo. 124. Beverlies case. Ovid. Scilicet in superis etiam fortuna luenda est. Nec veniam læso numine, casus habet.

33 H. 8. cap. 20. * 1 & 2 Ph. & Mar. ca. 10. a Bract. li. 3. fo. 118. Britton. cap. 8. a disheriter. Glanv. lib. 1. cap. 2. Fleta lib. 1. cap. 21. Mirror ca. 1. §. 5.

¶ Mort.] a He that declareth by overt act to depose the King, is a sufficient overt act to prove, that he compasseth and imagineth the death of the King. And so it is to b imprison the King, or to take the King into his power, and manifest the same by some overt act, this is also a sufficient overt act for the intent aforesaid. But peruse advisedly the statutes of 13 Eliz. cap. 1. 2. & 14 Eliz. cap. 1.

Vers Roy de la ere. a 13 Eliz. cap. 1. *nota declared.* Brook tit. treason. 24. b 1 H. 4. 1. 19 H. 6. 47. 13 H. 8. 12. *vide infra verb.* ¶ *Per overt fait.*

¶ Nre seignior le Roy.] These words extend to all his successors, as it hath been alwayes taken.

3 Mar. Dier. 131. pl. 7.

¶ Le Roy] Is to be understood of a King regnant, and not of one that hath but the name of a King, or a nominative King, as it was resolved in the case of

of King Philip, who married Queen Mary, and was but a nominative King, for Queen Mary had the office and dignity of a King, ſo as ſhe that wanted the name of a King, but had the office and dignity, was within this Act of 25 E. 3. And hee that had the name, and not the office and dignity of the King was not within it. And therefore an Act was made, that to compaſſe or imagine the death of King Philip, &c. during his marriage with the Queen, was treaſon. A Queen regnant is within theſe words, (nre ſeignior le Roy) for ſhe hath the office of a King. 1 & 2 Phi. & Mar. cap. 10.

This Act is to be underſtood of a King in poſſeſſion of the Crowne, and Kingdome: for if there be a King regnant in poſſeſſion, although he be Rex de facto, et non de jure, yet is he ſeignior le Roy within the Purvien of this ſtatute. And the other that hath right, and is out of poſſeſſion, is not within this Act. Nay if treaſon be committed againſt a King De facto, et non de jure, and after the King de jure commeth to the Crowne, he ſhall punish the treaſon done to the King de facto: And a pardon granted by a King de jure, that is not alſo de facto, is voyde. *Vide* 11 H. 7. c. 1. 4 E. 4. 1. 9 E. 4. 1. 2.

If the Crown deſcend to the rightfull heire, he is Rex before Coronation: for by the Law of England there is no interregnum: and Coronation is but an ornament or ſolemnity of honour. And ſo it was reſolved by al the Judges Hil. 1 Ia. in the caſe of Watſon and Clarke Seminary prieſts: for by the law there is alwayes a King, in whoſe name the lawes are to be maintained, and executed, otherwiſe Juſtice ſhould faile. Divers Kings before the Conqueſt voluntarily renounced their Kingly office: And ſo did King H. 2. in the 16. yeare of his reigne, and Henry his ſonne was created and crowned. Hil. 1 Ja. in the caſe of Watſon and Clark ſeminary prieſts. 9 E. 4. 1. b.

It appeareth by Britton, that to compaſſe the death of the father of the King, is treaſon, and ſo was the law holden long after that: For after King E. 2. had diſmiſſed himſelfe of his kingly office, and duty, and his ſonne by the name of E. 3. was crowned, and king regnant, thoſe curſed Caitifs, Thomas Gourny, and William Ocle, and others were attainted of High Treaſon for murthering the Kings father, who had been King by the name of E. 2. and had iudgement to be drawne, hanged, and quartered. See the preamble, *Auxint pur ceo que divers opinions ount eſté eins ceux heures, que quel caſe doit eſtre dit treaſon, et in quel caſe nō.* Rot. parliam. 4 E. 3. num. 5.

* The like iudgement was given againſt Sir Iohn Matrevers knight, and others, as being guilty of the death of the Kings uncle, Edmond Earl of Kent, which at that time (being ſo neer of the bloud royall) was by ſome holden alſo treaſon. But now this Act of 25 E. 3. hath reſtrained High treaſon in caſe of death (al nre ſeignior le Roy, ſa compaigne, et al eigne fitz, et heire le Roy. * Eodem Rot. num. 3. & 4.

Nicholas de Segrave was charged in open parliament in præſentia dñi. Reg. comitum, baronum, et aliorum de conſilio Regis tunc ibi exiſtent', that the King in the warre of Scotland being amongſt his enemies, Nicholas Segrave his liege man, and holding of the King by homage, and fealty, ſerved him for his aid in that warre, did maliciouſly move contention and diſcord without cauſe, with Iohn de Crombewell, charging him with many enormious crimes, and offered to prove it upon his body. To whom the ſaid Iohn anſwered, that he would anſwer him in the Kings Court, as the Court ſhould conſider, &c. and thereupon gave him his faith. After Nich. withdrew himſelfe from the Kings Hoſt, and from the Kings aid, leaving the King amongſt his enemies, in periculo hoſtium ſuorum, and adiourned the ſaid Iohn to defend himſelf in the court of the King of France, and prefixed him a certaine day, Et ſic quantum in eo fuit, ſubjiciens, et ſubmittens dominium regis, et regni ſubiectioni dñi. regis Franciæ, ad hoc faciendum, iter ſuum arripuit uſque Dovoriam, ad transfretandum, &c. All which the ſaid Nich. confeſſed, et voluntati dñi. regis de alto et baſſo inde ſe ſubmiſit. Et ſuper hoc dñs Rex volens habere aviſamentum Comitum, Baronum, Magnatum, et aliorum de conſilio ſuo, injunxit eiſdem in homagio, fidelitate, & ligeantiæ quibus ei tenentur, quod ipſum fideliter conſulerent, qualis pœna pro tali facto ſic cognito fuerit infligenda: qui omnes, habito ſuper hoc diligenti tractatu, & aviſamento, conſideratis, & intellectis omnibus in prædicto facto contentis, &c. dicunt quod hujuſmodi factum meretur amiſſionem vitæ & membrorum, &c. So as this offence was then ſolemnely in parliament adiudged High treaſon. But this is Plac. in Parliam. E. 1. *anno regni ſui* 33. North. Rot. 17. & 21.

taken away by this Act of 25 E. 3. being not under any of the claſſes, or heads ſpecified in this act.

40. Aſs. 25. So piracy by any of the Kings ſubiects upon another, was taken to be treaſon before this Act, for ſo is the book to be intended, becauſe a pirat is Hoſtis humani generis. But by this Act it is not now to be iudged treaſon. See hereafter in the chapter of Piracy.

One doth marie a Queen regnant, if the husband compaſſe the death of the Queene, and declare the ſame by overt act, he is guilty of treaſon, and puniſhable by this act, for to this and many other purpoſes ſhe is a diſtinct perſon by the common law. And ſo if a Queene wife of a King regnant, compaſſe the death of the King, and declare the ſame by overt act, ſhe is guilty of treaſon, and puniſhable by this act. So as (that we may ſpeak it once for all) by theſe and many others that might be cited, (ſome whereof ſhall hereafter be touched) the preamble of this act appeareth to be true, that divers opinions had been before the making of this act, what offences ſhould be adiudged High treaſon, and what not.

Britton cap. 8. and other ancient Authors *ubi ſupra.*

Rot. parlia. 3 R. 2. num. 18. See Placita coram rege Hill. an. 3 R. 2. (Cavendiſh) rot. 8. London Holl. cron. 3 R. 2. pa. 422. 60. b. &c.

* Monopoly.

vota his end.

This ſtatute having reſtrained the compaſſing, &c. of death to the King, Queen, & Prince, it came to paſſe after the making of this act, that in 3 R. 2. two Citizens of London, Iohn Kerby Mercer, and Iohn Algore Grocer conceiving malice againſt Iohn Imperiall Janevois of S. Mary in Genoa that came as Ambaſſadour from the ſtate of Genoa to the King (under the Kings Letters of ſafe conduct, for alliance to be had betweene the King and the Duke and Commonalty of Genoa aforeſaid) for that the ſaid Iohn Imperiall had obtained a * monopolie to furniſh this land (keeping his ſtaple at Southampton) of all ſuch wares as came from the Levant, ſo plentifully as was to be had in all the weſt parts of Chriſtendome, the ſaid Iohn Imperiall was killed by them, as more at large appears by the record. And albeit the ſaid Iohn Imperiall was an Ambaſſadour under the Kings ſafe conduct, and the killing of him was iuſti belli cauſa, yet the killing of him was no treaſon, becauſe it was not under any of the ſaid claſſes or heads, until it was at that time declared by parliament in theſe words, Quel caſe examine & diſpute inter les ſeigniors, & commons, & puis mſe al Roy en pleine parliament, eſtoit illonques devant nſre ſeignior le Roy declares, determinus & aſſentus, que tiel fait, & coupe eſt treaſon, & crime de royall majeſtie blemye, en quel caſe il ne doit allower a nulluy priviledge del clergie, and accordingly the ſaid Kerby and Algore were attainted of High treaſon in the Kings bench, Hill. 3 R. 2. ubi ſupra: but this declaration is taken away by the ſtatute of 1 Mariæ, as hereafter ſhall be ſaid, and yet of this declaration we ſhall make much uſe hereafter.

2 Regum cap. 10. 4. 12. 31. The killing of a foreine Ambaſſadour. *Honor legati, honor mittentis eſt, & proregis dedecus redundat in regem.*

22. Aſs. p. 49. *Mote dun Ambaſſad. le roy.* In the 22 yeare of E. 3. which was about 3 yeares before the making of this act, one Iohn at Hill had murdred A. de Walton the Kings Ambaſſadour, nuncium dñi regis miſſ. ad mandatum regis exequendum: this was adiudged High treaſon, for which he was drawne, hanged, and beheaded, &c. For true it is, quod legatus ejus vice fungitur, a quo deſtinatur, & honorandus eſt ſicut ille cujus vicem gerit, & legatos violare contra jus gentium eſt. But by this Act of 25 E. 3. it is reſtrained to the death de nſre ſeignior le Roy, and therefore prorex is not within this ſtatute.

¶ *Sa compaigne*] This word compaigne, (which is all one with conſort or wife) was uſed, that compaſſing, &c. muſt be during the marriage with the King, for after the Kings death ſhe is not ſa compaigne, and therefore it extendeth not to a Queene dowager, and for this cauſe this word compaigne was uſed in this Act.

¶ *Le fitz eigne & heire le Roy.*] The eldeſt ſonne and heire of a Queen Regnant is within this Law. Before this Statute ſome did hold, that to compaſſe the death of any of the Kings children, was Treaſon. But by this Act it is reſtrained to the Prince, the Kings Sonne, being heire apparant to the Crowne for the time being: and he need not be the firſt begotten ſonne, for the ſecond after the deceaſe of the firſt begotten without iſſue, is Fitz eigne within this

Britton *ubi ſupra.*

this ſtatute, & ſic de cæteris. If the heire apparant to the Crowne be a collaterall heire apparant, he is not within this ſtatute, untill it be declared by Parliament, as it was in the Duke of Yorks caſe.

Roger Mortimer Earle of March was in Anno Domini 1487 (11 R.2.) proclaimed heire apparant. Anno 39 H. 6. Richard Duke of York was likewiſe proclaimed heire apparant. And ſo was John de la Poole Earle of Lincolne, by R. 3. And Henry Marquiſſe of Exeter, by King Henry the eighth. But none of theſe or of the like, are within the Purview of this ſtatute. And now that we have handled compaſſings and imaginations, let us proceed to the reſidue which concerne Acts and Deeds.

¶ Heire is here taken for heire apparant, for he cannot be heire in the life of the Father.

℄ Si home violaſt la compaigne le Roy.] The Mirror ſaith. Crime de Majeſtie vers le Roy p ceux Avowterors q̄ ſpergiſſent la feme le Roy. Whereby it appeareth that this was High Treaſon by the common Law. Mirror ca.1. §.5. Brit. c.23.fo.43.a

Violare is here taken for carnaliter cognoſcere; and it is no treaſon, unleſſe it be done during the mariage with the King, and extendeth not to a Queen Dowager, as hath been ſaid. And if the wife of the King doth yeeld and conſent to him that committeth this treaſon, it is treaſon in her. 33 H.8.cap.21. Paſch.28 H. 8. in Spilmans Reports in Caſe of Queen Anne.

Ou la compaigne de lour fitz & heire.] This alſo extendeth to the wife of the Prince during the coverture betweene them, and not to a Dowager, and if the wife yeeld and conſent to him that commits this treaſon, it is treaſon in her. 33 H.8.ubi ſupra, in caſe of Queen Katherine.

℄ Heire.] Here is taken ut ſupra, for heire apparant.

Ou leigne file nient marie.] (That is,) eldeſt Daughter not married at the time of the Violation, albeit there had been an elder daughter then ſhe, who is dead without iſſue. * The Mirror. Avowterors q̄ ſpergiſſent la file le Roy eignes legittime, avant ceo q̄ el ſoit marie. * Mir. cap.1.§.5. See Brit. cap.23. fo.43. 44. &.cap. 29. fol.71. 1 Mar. Parl.2.c.1.

And the reaſon that the eldeſt only is here mentioned, is, for that for default of iſſue Male, ſhe only is inheritable to the Crowne. *a* Glanvil.lib.1. cap.2. l.14.c.1. Bracton. lib.3. fol.118. Britton.f.16, &c. Fleta.li.1.ca.21. Mir.ca.1.§.5.

℄ Ou ſi home leva guerre enconter noſtre ſeignior le Roy.] *a* This was High Treaſon by the Common Law, for no ſubiect can levie warre within the Realme without authority from the King, for to him it only belongeth. See F. N.B. 113. a. Le Roy de droit doit ſaver & defender ſon realme vers enemies, &c. *b* 1 Mar. 98.b. Dier. in Sir *N. Throgmortons* Caſe.

b A compaſſing or conſpiracy to levie war, is no Treaſon, for there muſt be a levying of war in facto. But if many conſpire to levie war, and ſome of them do levie the ſame according to the conſpiracy, this is High Treaſon in all, for in Treaſon all be principals, and war is levied. See 21 E.3.23. 21 R.2. cap. Repeale. 1 H.4.cap.3. 8 E.3. 20. See hereafter, cap.73. againſt going or riding armed.

If any levie war to expulſe ſtrangers, to deliver men out of priſons, to remove Counſellors, or againſt any ſtatute, or to any other end, pretending Reformation of their own heads, without warrant; this is levying of war againſt the King: becauſe they take upon them Royall Authority, which is againſt the King. There is a diverſity betweene levying of war and committing of a great Riot, a Rout, or an unlawfull aſſembly. *c* For example, as if three, or foure, or more, doe riſe to burne, or put downe an incloſure in Dale, which the Lord of the Manor of Dale hath made there in that particular place; this or the like is a Riot, a Rout, or an unlawfull Aſſembly, and no Treaſon. But if they had riſen of purpoſe to alter Religion eſtabliſhed within the Realme, or Laws, or to go from Town to Town generally, and to caſt downe Incloſures, this is a levying of war (though there be no great number of the Conſpirators) within the Purview of this Statute, becauſe the pretence is publick and generall, and not private *c* See Rot. Parl. in Cro. Epiphan. 20 E.1. Rot.23. *Humfrey de Bohuns* Caſe.4 Eliz. 210. b. Dier. See the ſtatute of 1 Mar.ca.1. By which, Grand Riots in ſome Caſes be made felony.

Paſch. 39. Eliz. by all the Judges of England, I being Attourney-Generall, and preſent.

priuate in particular. And ſo it was reſolved in the Caſe of Richard Bradſhaw Miller, Robert Burton Maſon, and others of Oxfordſhire, whoſe Caſe was, That they conſpired and agreed to aſſemble themſelves with ſo many as they could procure at Enſlowe-Hill in the ſaid County, and there to riſe, and from thence to go from Gentlemans houſe to Gentlemans houſe, and to caſt downe Incloſures, as well for inlargement of High-wayes as of errable Lands. And they agreed to get Armour and Artillery at the Lord Norrys his houſe, and to weare them in going from Gentlemans houſe to Gentlemans houſe for the purpoſe aforeſaid, and to that purpoſe they perſwaded divers others: and all this was confeſſed by the offenders. And it was reſolved, That this was a compaſſing and intention to levie war againſt the Queen, becauſe the pretence was publick within the ſtatute of 13 Eliz. cap. 1. (the Letter whereof herein ſhortly followeth,) and the Offenders were attainted and executed at Enſlowe-Hill.

And this diverſity is proved by a latter Branch of this Act.

Et ſi per caſe aſcun home de ceſt realme chimancha arme diſcovert ſecretement ove gents armes, contre aſcun autre, pur luy tuer, ou diſrober, ou pur luy prender, ou retayner tanq il face fine, ou ranſome pur ſa deliverance, neſt lentention le Roy & de ſon counſell, & en tiel caſe ſoit adjudge treaſon, mes ſoit adjudge felony, ou treſpaſſe, ſolonq le ley del tre auncientment uſe. Whereby it appeareth, that bearing of armes in warlike manner, for a priuate revenge or end, is no levying of war againſt the King within this ſtatute. So that every gathering of force is not High Treaſon. And ſo it was reſolved in Parliament in 5 H. 4 Rot. Parliam. nu 11. & 12. the Earle of Northumberlands Caſe.

Rot. Parl. 5 H. 4. nu. 11, 12. 13 Eliz. cap. 1. b. The Indictments and Attainders of treaſon by force of this ſtatute are not more to be followed, becauſe the ſtatute, which made them good, is expired. Dier, 3 & 4 Ph. & Mar. 144. 10 E. 4. 6. 1 Mar. Treaſon, Br. 24. Ter. Mic. 8 H. 8. Mich. 7 H. 5. Coram Rege. Heref. Rot. 20.

By the ſaid Statute of 13 Eliz. cap. 1. it is enacted, declared, and eſtabliſhed, That during the naturall life of Queene *Elizabeth*, if any within the Realme or without, ſhould compaſſe, imagine, invent, deviſe, or intend to levie war againſt her Majeſty, within this Realme, or without, and the ſame declare by writing, or word, &c. that it ſhould be High Treaſon: So during the life of the Queen, a conſpiracy to levie war was High Treaſon, though no war were levied; and upon that law, Bradſhaw, Burton, and others, were attainted of High Treaſon, for conſpiracy only to levie war. But it was reſolved by all the Juſtices, that it was no treaſon within the ſtatute of 25 E. 3. as hath been ſaid. The words in this law are [levie guerre] An actuall Rebellion or Inſurrection is a levying of war within this Act, and by the name of levying war is to be expreſſed in the Indictment. If any with ſtrength and weapons invaſive, and defenſive, doth hold and defend a Caſtle or Fort againſt the King and his power, this is levying of war againſt the King within this Statute of 25 E. 3.

[a] Rot. Parl. 20 E. 1. nu. 2. *John de Brittaines* Caſe. Rot. Parl. 33 E. 1. Rot. 6. *Rob. de Kos de Werkes* caſe. 8 E. 3. 26. 38 E. 3. 31. 2. Parl. 4 R. 2. nu. 17, 18, &c. 5 R. 2. Triall 54. Hil. 18 E. 3. coram rege. Rot. 145. Eborum. 43. Aſſ. 28. 42. Aſſ. 29. *Gilbert de M.* was a Scot. Rot. Parl 7 R. 2. nu. 15. 17. 24. 7 H. 4 47. Cuſt. de Norm. ca. 73.

It was reſolved by all the Judges of England in the reigne of King H. 8. that an Inſurrection againſt the Statute of Labourers, for the inhanſing of ſalaries and wages, was a levying of war againſt the King, becauſe it was generally againſt the Kings Law, and the offenders took upon them the reformation thereof, which ſubiects by gathering of power ought not to do. It was ſpecially found, that divers of the Kings ſubiects did miniſter and yeeld victuals to Sir John Oldcaſtle Knight, and others, being in open war againſt the King, and that they were in company with them in open war; but all this was found to be pro timore mortis, & quod receſſerunt, quam cito potuerunt: and it was adiudged to be no Treaſon, becauſe it was for feare of death. Et actus non facit reum, niſi mens ſit rea. And therefore this in them was no levying of war againſt the King within this Act.

¶. Ou ſoit adherent as enemies noſtre ſeigniour le roy, a eux donant aide & comfort en ſon roialme & aylors.]

¶ Adherent.] [a] This is here explained, viz. in giving aide and comfort to the Kings enemies within the Realme or without: Delivery or ſurrender of the Kings Caſtles or Forts by the Kings Captaine thereof to the Kings enemie within the Realme or without for reward, &c. is an adhering to the Kings enemy, and conſequently treaſon declared by this Act. [b] A. is out of the

[a] *Vid.* 13 Eliz. Dier. 298.

the Realme at the time of a Rebellion within England, and one of the Rebels flye out of the Realme, whom A. knowing his treaſon doth aide or ſuccour, this is no treaſon in A. by this branch of 25 E. 3. becauſe the traytor is no enemy, as hereafter ſhall be ſaid; and this ſtatute is taken ſtrictly.

¶ As enemies.] Inimicus in legall underſtanding is hoſtis, for [c] the ſubiects of the King, though they be in open war or rebellion againſt the King, yet are they not the Kings enemies, but traytors; for enemies be thoſe that be out of the allegiance of the King. If a Subiect ioyne with a forraine Enemy and come into England with him, he ſhall not be taken priſoner here and ranſomed, or proceeded with as an enemy ſhall, but he ſhall be taken as a traytor to the King.

[d] An Enemy comming in open hoſtility into England, and taken, ſhall be either executed by Marſhall-Law, or ranſomed; for he cannot be indicted of treaſon, for that he never was within the protection or ligeance of the King, and the Indictment of Treaſon ſaith, Contra ligeantiam ſuam debitam.

[e] David Prince of Wales levied war againſt E. 1. This was Treaſon, for that he was within the homage and ligeance of the King, and had iudgement given againſt him as a Traytor, and not as an enemy. And albeit in many preſidents of Indictments, Subiects that be Rebels, and Traytors, &c. be called proditores & inimici; yet within this ſtatute they are not inimici.

[f] In the Duke of Northfolks Caſe the queſtion was, a league being between the Queene of England and the King of Scots, whether the Lord Heriſe and other Scots in aperto prælio burning and waſting divers Townes in England without the aſſent of the King, were enemies in law within this ſtatute, and reſolved that they were. [g] See more hereafter in this third part of the Inſtitutes. cap. 49. of Piracy, &c. upon the ſtatute of 28 H. 8. cap. 15.

Ou per ailors.] That is to ſay, out of the Realme of England. But then it may be demanded, how ſhould at this time this forraine treaſon be tried? And ſome [h] of our Books doe anſwer, that the offender ſhall be indicted and tried in this Realme where his land lyeth, and ſo it was adiudged in 2 H. 4 But now by the ſtatute of 35 H. 8. cap. 2. (which yet remains in force) All offences made or declared, or hereafter made or declared treaſons, miſpriſions of treaſon, and concealements of treaſon, committed out of the Realme of England, ſhall be inquired of, heard, and determined, either in the Kings Bench or before Commiſſioners in ſuch Shire as ſhall be aſſigned by the King. If it be before Commiſſioners, it hath been commonly uſed, that the King doth write his name in the upper part of the Commiſſion. But in the Caſe of Patrick O Cullen an Iriſhman, the Queene did put her Signature to the Warrant to the Lord Keeper, and not to the Commiſſion: * and it was holden by the Juſtices that the one way and the other was a ſufficient aſſignement by the King within the ſtatute of 35 H. 8.

[i] It was reſolved by all the Judges of England, that for a treaſon done in Ireland the offender may be tryed by the ſtatute of 35 H. 8. in England, becauſe the words of the ſtatute be, All Treaſons committed out of the Realme of England, and Ireland is out of the Realme of England. And ſo it was reſolved in Sir John Parrots Caſe. And our word here [per ailors] is as much as out of the Realme of England. See Paſch. 2 H. 4. coram Rege Rot. 8. Salop. Treaſon in Wales.

[k] All treaſons done upon the Sea ſhall be inquired, heard, and determined in ſuch ſhires and places of the Realme as ſhall be limited by the Kings Commiſſion, in like forme and condition, as if the ſame had been done upon the land, &c. after the common courſe of the lawes of this land. And by the preamble it appeareth, that it could not be tryed by the Common law, but by the Civill law before the Lord Admirall. See hereafter in the expoſition of the ſtatute of 28 H. 8. cap. 15. & iufra, cap. 49.

¶ Et

See hereafter.
35 H. 8. cap. 2.
c 43 Aſſ. 28, 29.
33 H. 6. 1.
19 E. 4. 6. 2. & b.
4 Mar. Treaſon. Br. 32.
1 Mar. ibid. 24.
21 E. 3. 23.
22 Aſſ. p. 49.
13 El. Dyer 298.
Ex libro de Griffin de Perkin Werbeck.
d Dier 4. Mar. fo. 145. a.
Lib. 7. fo. 6. b. Calvins Caſe.
e Fleta. lib. 1. c. 16
f Mich. 13 & 14. Eliz. per Juſtice.
19 E. 4. 6. b.
18 H. 6. ca. 4.
20 H. 6. cap. 1.
g 27 E. 3. cap. 13.
31 H. 6. cap. 4.
7 E. 4. 14. 13 E. 4. 9. 21 E. 3 16, 17. Regiſt. 129. Fit. N. B. 114.
b 4 Aſſ. p. 15.
5 R. 2. *ubi ſupra.*
19 E. 4. 6. b.
Dier. 3 Mar. 132.
Paſch. 2 H. 4. *coram rege.* Rot. 8. Wallia.
35 H. 8. cap. 2.
3 Mar. *ubi ſupra.*
13 Eliz. Dier. 298. Stanford Pl. Cor. fo. 90. a. & b. See the firſt part of the Inſtitutes, 440.
* Hil. 36 Eliz. in the Caſe of Patrick O Cullen, for a Treaſon at Bruſſels *in partibus Marinis.*
i 33 El. in Ornicks caſe, lib. 7. f. 23. *Calvins* caſe. *Vid.* Dier. Mich. 19 & 20 Eliz. fo. 360 lib. 11. fo. 63. in Doct. *Foſters* Caſe.
k 28 H. 8. ca. 15. This Act concerning Treaſons is not taken away by the ſtatute of 35 H. 8. cap. 2. *Vide infra* cap. 49. fo. 181. of Piracy, &c. Vid. 5 Eliz. c. 5.

¶ Et de ceo provablement ſoit attaint per overt fait per gents de lour condition.] In this branch 4 things are to be obſerved.

g Sec 1 E.6. ca. 12. the laſt clauſe. 5 E. 6. ca. 11. 1 & 2 Ph. & Mar. ca. 10. & 11. 1 Eliz. cap. 6. 13 Eliz. cap. 1. Stanf. pl. Cor. 89. & 164. Br. coron. 4. Mar. 220. Dier. 2 Mar. fo. 99.

g First this word [provablement] provably, that is, upon direct and manifeſt proof, not upon coniecturall preſumptions, or inferences, or ſtraines of wit, but upon good and ſufficient proofe. And herein the adverb [provablement] provably, hath a great force, and ſignifieth a direct and plain proof, which word the King, the Lords, and Commons in Parliament did uſe, for that the offence was ſo hainous, and was ſo heavily, and ſeverely puniſhed, as none other the like, and therefore the offender muſt provably be attainted, which words are as forcible, as upon direct and manifeſt proof. Note, the word is not (probably) for then commune argumentum might have ſerved, but the word is [provably,] be attainted.

* Rot. parl. an. 33 E. 1. Rot. 6. Jo. Salvyns caſe. h 43. Aſs. 28. 8 E. 3. 20. 7 H. 4. 27. 34 E. 3. cap. 12. Lib. 4. fo. 57. the Sadlers caſe. *29 H. 6. cap. 1.

2 This word (attaint) neceſſarily implyeth that he be proceeded with, and attainted according to the due courſe, and proceedings of law, and not by abſolute power, or by other meanes, * as in former times had been uſed. h And therefore if a man doth adhere to the enemies of the King, or be ſlaine in open warre againſt the King, or otherwiſe die before the attainder of treaſon, he forfeiteth nothing, becauſe (as this Act ſaith) he is not attainted: wherein this Act hath altered that, which before this Act, in caſe of treaſon, was taken for law. And the ſtatute of 34 E. 3. cap. 12. ſaves nothing to the King, but that which was in eſſe, and pertaining to the King at the making of that Act. And this appeareth by a iudgement in parliament in Anno 29 H. 6. cap. 1. That * Jack Cade being ſlaine in open rebellion could no way be puniſhed, or forfeit any thing, and therefore was attainted by that act of High treaſon.

vide ſupra verbo ¶ *Mort.* fo. 6.

3 ℭ Per overt fait,] per apertum factum. This doth alſo ſtrengthen the former expoſition of the word (provablement,) that it muſt be provably, by an open act, which muſt be manifeſtly proved. As if divers doe conſpire the death of the King, and the manner how, and thereupon provide weapons, powder, * poiſon, aſſay harneſs, ſend letters, &c. or the like, for execution of the conſpiracy. Alſo preparation by ſome overt act, to depoſe the King, or take the King by force, and ſtrong hand, and to impriſon him, untill he hath yeelded to certaine demands, this is a ſufficient overt act to prove the compaſſing, and imagination of the death of the King: for this upon the matter is to make the King a ſubiect, and to diſpoyle him of his kingly office of royall government. And ſo it was reſolved by all the Iudges of England. Hill. 1 Iac. regis, in the caſe of the Lo. Cobham, Lord Gray, and Watſon and Clarke Seminary prieſts: And ſo had it been reſolved by the Iuſtices, Hill. 43. Eliz. in the caſe of the Earles of E. and of S. who intended to goe to the court where the Queen was, and to have taken her into their power, and to have removed divers of her Counſell, and for that end did aſſemble a multitude of people; this being raiſed to the end aforeſaid was a ſufficient overt act for compaſſing the death of the Queen. And ſo by woful experience in former times it hath fallen out, in the caſes of King E. 2, R. 2. H. 6. and E. 5. that were taken, & impriſoned by their ſubiects. And this is made more plain by the legall forme of an inditement of treaſon: For firſt it is alledged according to this act, Quod * proditorie compaſſavit, & imaginatus fuit mortem & deſtructionem dñi regis, & ipſum dom. regem interficere, &c. In the ſecond part of the inditement is alledged the overt act, et ad illam nephandam, & proditoriam compaſſationem, imaginationem, & propoſitum ſuum perficiend' & perimplend' and then certainly to ſet downe the overt fact for preparation to take, and impriſon the King, or any other ſufficient overt act, which of neceſſity muſt be ſet downe in the Inditement. Hereby it appeareth how inſufficient many inditements were of High treaſon, wherein it was generally alledged, that per apertum factum compaſſavit, & imaginatus fuit mortem dom. regis, &c. * For example Termo Mic. anno 5 E. 6. Edward Duke of Somerſet was indited before Commiſſioners of Oyer and terminer in London, quod ipſe deum præ oculis ſuis non habens, ſed inſtigatione diabo-

lica

Hill. 1 Ia. R. Lo. Cobhams caſe.

* In ancient time *traditioſè, & feloniceè.* parl. 33 E. 1. rot. 6. Robert de Ros his caſe, but now *proditoriè* is neceſſarily required. vide Britton fo. 16. et 19. 1. Mar. Br. treaſon. 24. * Ter. Mic. 5 E. 6. Lib. Intr. Coke fo. 48 a. *Sanguinis O maledicta filii, &c.*

lica ſeductus, apud Holborne in parochia Sancti Andreæ infrà civitatem London, *viz.* 20 die Aprilis anno regni domini Regis Edw. ſexti quinto, & diverſis diebus & vicibus antea & poſtea falſo, malicioſe, & proditorie * per apertum factum circumivit, compaſſavit, & imaginavit cum diverſis aliis perſonis prædictum dominũ Regem de ſtatu ſuo regali deponere & deprivare, &c. Which Indictment, and all others of like forme were againſt law, as hath been ſaid, and of the matter of this Indictment that noble Duke was by his Peers found not guilty. But then it may be demanded, for what offence he had iudgement of death, and 2. what law made it an offence. The offence appeareth in his Indictment, for the former part thereof contained High Treaſon, whereof he was acquited, & the latter part contained one only offence of felony (whereof he was found guilty) in theſe words, Et ulterius Juratores præd. præſentant, quod præfatus Edwardus dux Somerſet Deũ præ oculis ſuis non habens, ſed inſtigatione diabolica ſeductus 20 Maii An. regni dicti Dom. Regis Edwardi ſexti quinto ſupradicto, ac diverſis aliis diebus & vicibus antea & poſtea apud Holborn in præd. paroch. Sancti Andreæ in civitate London, & apud diverſa alia loca infra civitatem London præd. felonice ut felõ dicti Dom. Regis per aperta verba & facta procuravit, movit, & inſtigavit complurimos ſubditos ipſius domini Regis ad inſurgendum, & apertam rebellionem & inſurrectionem infra hoc regnum Angliæ movend' contra ipſum dominum Regem, & ad tunc & ibid. felonice ad capiendum & impriſonandum prænobilem Johannem comitem Warwick de privato conſilio domini Regis ad tunc exiſten', contra pacem dicti domini Regis coronam & dignitatem ſuam, & contra formam ſtatuti in hujuſmodi caſu editi & proviſi. The ſtatute whereupon this Indictment was intended to be grounded, was the branch of the ſtatute of 3 & 4 E. 6. by which it is provided, [That if any perſon or perſons by ringing of any Bel, &c. or by malicious ſpeaking or uttering of any words, or making any Outcry, &c. or by any other deed or act ſhall raiſe or cauſe to be raiſed or aſſembled any perſons to the number of 12 or above, to the intent that the ſame perſons ſhould do, commit, and put in ure any of the acts or things above mentioned (whereof to take and impriſon any of the Kings moſt honourable Privie Counſell was one) and the perſons to the number of 12 or above ſo raiſed and aſſembled after requeſt and commandement (in ſuch ſort as in that Act is preſcribed) ſhall make their abode and continue together, as is aforeſaid, (in the Act) or unlawfully perpetrate, doe, commit, or put in ure any of the acts or things abobeſaid, that then all and ſingular perſons by whoſe ſpeaking, deed, act, or any other the meanes above ſpecified any perſons to the number of 12 or above, ſhall be raiſed or aſſembled for the doing, committing, or putting in ure any of the acts or things above mentioned, ſhall be adiudged for his ſo ſpeaking or doing a felon, and ſuffer execution of death as in caſe of felony, and ſhall loſe his benefit of Sanctuary and Clergy.] Hereby it doth manifeſtly appeare, that the truth concerning this Noblemans attainder, and execution in divers things, is contrary to the vulgar opinion, and ſome of our Chronicles, and in ſome points contrary to law. Firſt, that for the felony made by the ſaid branch of the ſaid Act he could not have had his Clergie, for Clergie in that Caſe is expreſly ouſted by the ſaid Act. 2. That he was not indicted for going about, &c. the death of the Earle of Warwick then of the Kings Privie Counſell, but only for his taking or impriſonment, and therefore could not be indicted upon the ſtatute of 3 H. 7. as ſome have imagined. 3. That the Indictment is altogether inſufficient, for it purſueth not the words or matter of the ſaid branch of the ſaid Act, as by comparing of them it manifeſtly appeareth; which (we being deſirous that truth may appeare in all things) we have thought good upon this occaſion to adde for advancement of truth. 4. That being but attainted of felony, he could not by law be beheaded, as elſewhere we have ſhewed. And this Act that created the felony ſaith, that ſuch a felon ſhall ſuffer execution of death, as in caſe of felony. 5. Laſtly, this whole Act was iuſtly holden to be a doubtfull and dangerous ſtatute, and therefore was deſervedly repealed. And after the fall of this Duke, ſee the preamble of the ſtatute of Subſidie of 7 E. 6.

* Per apertum factum.

Vid. hereafter ca. 5. de Hereſie, generall Ind & ments againſt Lollards, &c.

The reſidue of the Indictment of the Duke of Somerſet.

To take and impriſon one of the Privie Councell. Contra formam Statut.

3 & 4 E. 6. cap. 5.
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3 H. 7. ca. 14.

Lib. 9. fo. 114. in Seignior Sanchers caſe.

1 Mar. cap. 12.
1 Eliz. ca. 16.
7 E. 6. ca. 11.

And now to returne to Caſes of High Treaſon. If a man be arraigned upon an Indictment of High Treaſon, and ſtand mute, he ſhall have ſuch iudgement, and incurre ſuch forfeiture, as if he had been convicted by Verdict, or if he had confeſſed it. For this ſtandeth well with this word provablement, for fatetur facinus, qui iudicium fugit: but otherwiſe it is in caſe of Petit Treaſon, Murder, or other Felony.

13 Eliz. Dier 298
13 Eliz. cap. 1.
Nota bene. Vide ſupra verbo Mort.
* Inter leges Alveredi, cap. 4.

If a ſubiect conſpire with a forraine Prince beyond the ſeas to invade the Realme by open hoſtility, and prepare for the ſame by ſome overt act, this is a ſufficient overt act for the death of the King, for by this Act of Parliament in that Caſe there muſt be an overt act. * Qui capiti, aut ſaluti Regis perfidioſe ſive ſolus, ſive ſervis aut ſicariis mercede conductis ſtipatus inſidiabitur, vita & fortunis ejus omnibus privator. So as thereby an overt act was required.

* So reſolved by the Juſtices Paſc. 35 Eliz. which we heard and obſerved.

The compoſition and connexion of the words are to be obſerved, viz. [thereof be attainted by overt deed.] * This relateth to the ſeverall and diſtinct treaſons before expreſſed, (and ſpecially to the compaſſing and imagination of the death of the King, &c. for that it is ſecret in the heart) and therefore one of them cannot be an overt act for another. As for example: a conſpiracy is had to levie warre, this (as hath been ſaid, and ſo reſolved) is no treaſon by this Act untill it be levied, therefore it is no overt act or manifeſt proofe of the compaſſing of the death of the King within this Act; for the words be (de ceo, &c.) that is, of the compaſſing of the death. For this were to confound the ſeverall Claſſes, or membra dividentia, & ſic de cæteris, &c.

a 26 H. 8. cap. 13.
1 E. 6. cap. 13.
1 & 2 Ph. & Mar. cap. 9, 10.
1 Eliz. cap. 6.
13 Eliz. ca. 1, &c.
14 Eliz. cap. 1.

a Divers latter Acts of Parliament have ordained, that compaſſing by bare words or ſayings ſhould be High Treaſon; but all they are either repealed or expired. And it is commonly ſaid, that bare words may make an Heretick, but not a Traytor without an overt act. And the wiſdome of the makers of this law would not make words only to be Treaſon, ſeeing ſuch variety amongſt the witneſſes are about the ſame, as few of them agree together. But if the ſame be ſet downe in writing by the Delinquent himſelfe, this is a ſufficient overt act within this ſtatute.

b See the fourth part of the Inſtitutes, ca. 26. Brook treaſon 24 writing of Letters.

b Cardinall Poole, albeit he was a ſubiect to H. 8. and of the Kings blood, (being deſcended from George Duke of Clarence, Brother to King E. 4.) yet he in his Booke of the Supremacy of the Pope, written about 27 H. 8. incited Charles the Emperour, then preparing againſt the Turke, to bend his force againſt his naturall Soveraigne Lord and Countrey; the writing of which Booke was a ſufficient overt act within this ſtatute: and to move the Emperour the rather in that Booke, he made H. 8. almoſt as ill as the Turk, in theſe words, In Anglia ſparſum nunc eſt hoc ſemen, ut vix à Turcico internoſci queat, idque authoritate unius coaluit.

c 1 Mar. ceſſ. 1. c. 1

c In the Preamble of the ſtatute of 1 Mar. concerning the repeale of certaine Treaſons, &c. It is agreed by the whole Parliament, that lawes iuſtly made for the preſervation of the Common-wealth without extreame puniſhment, are more often obeyed and kept, then lawes and ſtatutes made with great and extreame puniſhments; and in ſpeciall, ſuch lawes and ſtatutes ſo made: whereby not only the ignorant and rude unlearned people, but alſo learned and expert people minding honeſty, are oftentimes trapped and ſnared, yea, many times * for words only, without other fact or deed done or perpetrated: therefore this Act of 25 E. 3. doth provide, that there muſt be an overt deed. But words without an overt deed *d* are to be puniſhed in another degree, as an high miſpriſion.

d See in the chapter of Miſpriſion.

¶ Per gents de lour condition.] That is, per pares, or their equals, whereof we have ſpoken before in the expoſition of the *e* 29 Chapter of Magna Carta. Verb. per judicium parium ſuorum, and more ſhall be ſaid hereafter. This Branch (per gents de lour condition) extendeth only to a conviction by Verdict, whereof the ſtatute particularly ſpeaketh; but yet where the party indicted confeſſeth the offence or ſtandeth mute, he ſhall have iudgement as in caſe of High Treaſon. For this branch being affirmative, is taken cumulative

e Mag. Car. ca. 29.

and

and not privative. And therefore seeing upon confession, or standing mute, the iudgment in case of high treason was given at the common law, this Act being, as it hath been said affirmative, taketh not away the same. And (to say once for all) the clause hereafter of restraint of like cases, &c. extends onely to offences and not to tryalls, iudgements, or executions.

¶ Si home counterface le grand Seale] All our ancient Authors agree that this was High treason by the common law, and for this offence his iudgement was to be drawn, hanged, and quartered at the common law, as in other cases of High treason, (the counterfeiting of the Kings money excepted.) See The second part of the Institutes. W. 1. cap. 5.

Bract. l. 3. fo. 118. Brit. fo. 10. &c. Bract. l. 5. fo. 414. Fleta l. 1. ca. 21. Mirror ca. 1. § 6. de fausonerie. 29 Ass. pl. 49. * 1 E. 3. tit. Chre F. 13. 22 Ass. pl. 49.

* In ancient time every treason was comprehended under the name of felony, but not è contra: And therefore a pardon of all felonies was sometime allowed in case of High treason. But the law is, and of long time hath been otherwise holden: and if the inditement were felonicè, and not proditorie, (for the King may lessen the offence, if it please him) then the pardon of felonies is good at this day, for no Inditement can be of High treason without this word (proditoriè:) and in qualibet proditione implicatur felonia, quia in quolibet brevi de exigendo super quolibet indictamento de proditione proclamator facit sic, I. B. An ertgent on thy head of treason and felony.

2 R. 3. 9.

3 H. 7. 10 a.

A Compassing, intent, or going about to counterfeit the great seale is no treason, but there must be an actuall counterfeiting, also it must be to the likenesse of the Kings great seale, the words be, Counterface le grand seale le Roy.

Now it is to be seen what shall be said a forging or counterfeiting of the great seale. If the Lord Chancellor, or Lord Keeper put the great seale to a Charter &c. without warrant, this is no treason, because the great seale is not counterfeited. But it seemeth by Briton fo. 10. b. that it was treason at the common law, and of that opinion is Fleta fo. 29. a. but it is no treason now (without question) by the negative clause of this Act.

If a man take war lawfully imprinted with the great seale from one patent, and fix it to a writing purporting a grant from the King, there have been divers opinions in this case what the offence is, which we will rehearse.

In 40. Ass. which was about 15. years after the making of this Act, it was not holden High treason, but a great misprision, for that it is no counterfeiting of a new, but an abuse of the true great seale.

40 Ass. p. 33.

In 42 E. 3. the Abbot of Buer caused Rob. Rigge his Connusigne to raise a Charter of R. 1. and put out the manner of Fisserruda, and in place thereof put in Esleghe. And this offence was heard, and sentenced before the King and his Counsell in the Star-chamber, as a great offence and misprision: for if it had been High treason, it should have had another tryall, and yet this was a great abuse of the great seal.

Rot. Claus. 42 E. 3. nu. 8. in Corp.

2 H. 4. The taking of the Great Seal from one Patent, and fixing it to a Commission to gather mony, &c. was adiudged to be such an offence, as the offender had iudgement to be drawne, and hanged. The record of which case we have perused, and the effect thereof is this. The partie is indited generally for counterfeiting of the great seal, whereunto he pleaded not guilty, and the Iury found him not guilty of the counterfeitting of the great seale, as was supposed by the inditement, and found further specially, that he tooke the great seale from one patent, and put it to the commission, and that the party put the same in execution, and there iudgement was given, that he should be drawne and hanged: which (whatsoever the offence was) ought not to have been given upon this verdict, the Iury finding him not guilty of the offence alledged in the inditement: And besides the iudgement is such, as is given in case of Petit treason, and not of high treason. Hereby it appeareth how dangerous it is for any to report a case by the ear, specially concerning treason, unlesse he had advisedly read the Record: for (as I take it) the misreport of this case hath hatched errors, and he mistooke the iudgment, if it had been High treason, for then it should have been drawne, hanged, and quartered.

2 H. 4. fo. 25.

Errores ad sua principia referre, ibi residere. To bring errors to their beginning, is to see their last.

37 H. 8. Br. Treaſon.

37 H. 8. Br. tit. Treaſon. A Chaplain had fired ſuch a great Seale to a Patent of diſpenſation with non-reſidence, and this was holden a miſpriſion, and not High treaſon, for it was an abuſe of the great ſeale, and no counterfeiting of it.

Stanf. Pl. Coron. fo. 3. c. Bracton agreeth with it. *Vbi ſupra.* Leaks Caſe. Hil. 4. Ja. R.

Stanford ſaith that it was adiudged in his time according to the book of 2 H. 4. Et ſic ex errore ſequitur error.

G. Leak a clark of the Chancery ioyned two cleane parchments fit for letters patents ſo cloſe together with mouth glew, as they were taken for one, the uppermoſt being very thinne, and did put one labell through them both, then upon the uttermoſt he writ a true patent, and got the great ſeale put to the labell, ſo the labell and the ſeale were annexed to both the parchments, the own written, and the other blanck: he cut off the glewed ſkirts round about, and tooke off the uppermoſt thinne parchment (which was written, and was a true and perfect patent) from the labell, which with the great ſeale did ſtill hang to the parchment, then he wrote another patent on the blancke parchment, and did publiſh it as a good patent. Hereupon two queſtions were moved. 1. Whether this offence be High treaſon or no. 2. If it be High treaſon, then whether he may be indited generally for the counterfeiting of the great ſeale, or els the ſpeciall fact muſt be expreſſed. And upon conference had between the Iudges, upon great adviſement and conſideration it was in the end, concerning the firſt point, reſolved by the Iuſtices (ſaving a very few) upon the authorities aforeſaid, and for that it was no counterfeiting of the great ſeale within this ſtatute, that this offence was neither High treaſon, nor Petit treaſon, becauſe it is not within either of the branches of this ſtatute, but it is a very great miſpriſion, and the party delinquent liveth at this day. As to the 2. point it was reſolved, that if the ſpeciall matter had amounted to counterfeiting of the great ſeale in law within this act, then he might haue been generally indited of High treaſon for counterfeiting the great ſeale. As if a man in an affray kill a Conſtable that comes to keep the Kings peace without any expreſſe malice prepenſed, this is murder in law, and yet the delinquent may bee generally indited of murder by malice prepenſed.

40. Aſſ. 33. 42 E. 3. Rot. Cl. *Vbi ſupra.* 37 H. 8. Br. dev.

And [a] Fleta who wrote before this act telleth us, that Crimen falſi dicitur, cũ quis illicitus (cui non fuerit ad hoc data authoritas) de ſigillo regis rapto vel invento, & brevia cartaſque conſignaverit. But whatſoeber offence it was before the making of this ſtatute, it is after this ſtatute no High treaſon, becauſe it is no counterfeiture of the great ſeale, but a miſuſer thereof.

[a] Fleta l. 1. ca. 22. Britton fo. 10. b. See before. fo. 15.

Qui [b] convictus fuerit pro falſatione ſigilli dom. regis, quòd tradatur Epiſcopo Sarum, qui eum petiit ut clericum ſuum ſub pœna & in forma qua decet, quia videtur concilio quod in tali caſu non admittenda eſt purgatio, &c. Hereby it ſhould appeare that in thoſe dayes a man might have had his Clergie for this offence, and therefore as ſome hold, it was not then holden to be High treaſon, & herein alſo is the preamble of this act, concerning divers opinions in caſe of treaſon, verified.

[b] Rot. Parl. Hil. 18 E. 1. fo. 92. nu. 125.

This ſtatute naming the great ſeale and privie ſeale, the forging and the counterfeiting of the privie ſignet, or of the ſigne manuell was not within this ſtatute. But by the [c] ſtatute of 1 Mar. it is made High treaſon in both caſes. Albeit that in this act there is no mention made of * aiders and conſentors to this counterfeiting, yet they are within the purvien of this ſtatute, for there be no acceſſaries in High treaſon.

[c] 1 Mar. cap. 6. 1 & 2 Ph. & Mar. ca. 11.

* 19 H. 6. 47. 3 H. 7. 10. Stanf. Pl. Coron. 3. vide poſtea ca. 64. *principall & acceſſ.* See Mich. 13 & 14 Eliz. Dier 296. Coniers Caſe.

¶ Ou ſa [d] monye.] [e] This was treaſon by the common law, as it appeareth by all the ſaid ancient authors, ubi ſupra (verbo, Si home counterface le grand ſeale) and therefore the opinion in 3 H. 7. is holden for no law, that it was but felony before this act. [f] The forging of the Kings coine, is High treaſon, without utterance of it, for by this act the counterfeiting is made High treaſon. See the ſecond part of the Inſtitutes. W. 1. cap. 15. [g] See Thom. Walſingham. Hypodigme Neuſtrie. An. Dom. 1278. Judei protonſura monetæ in magna multitudine ubique per Angliam ſuſpenduntur, &c.

[d] 3 H. 7. 10. 2. b. [e] 22 Aſſ. p. 49. 3 H. 7. 10. 25 E. 3. 42. b. Coro. 130. [f] 6 H. 7. 13. 1 R. 3. 1. [g] Walſ. Hyp. Neuſtrie pa. 69. 1278. 6 E. 1.

h Si ipſe qui facit monetam authoritate regis, &c. illam facit minus in pondere vel

vel allaiata, *viz.* Alcumino vel alio falſo metallo contra ordinationem, &c. This is there holden to be High Treaſon, and by that Book taken for a counterfeiter of the Kings money within the Purview of this ſtatute. [a] And herewith agreeth Britton, who ſaith, Des fauceres q̃ ount noſtre monye counterfet ou pluis de allaye miſe in noſtre monye, q̃ nuller, ne ſerroit ſolonq̃ le forme & uſage de noſtre Realme.

[b] Ordeine fuit q̃ nul roy de ceſt realme ne puit changer ſa money, ne impairer, ne amender, ne auter monye faire q̃ de ore & argent, ſans aſſent de touts les Counties. It was ordained, that no King of this Realme might not change his money, nor impaire, nor amend the ſame, nor other money make then of Gold or Silver, without aſſent of Parliament.

[c] Clipping, waſhing, and filing of the money of this Realme, was no counterfeiting of it within this Act. And therefore being a like Caſe, it was declared by Parliament in Anno 3 H. 5. cap. 6. to be High Treaſon; but that Act being repealed by 1 Mariæ the ſtatute of 5 Eliz. cap. 11. hath [d] declared, that clipping, waſhing, rounding, or filing, for wicked lucre and gaine, &c. to be High Treaſon. And by the ſtatute of [e] 18 Eliz. it is declared, That if any perſon for wicked lucre or gaines-ſake, ſhall by any art, wayes, or meanes whatſoever, impaire, diminiſh, falſifie, ſcale, or lighten the Kings money, &c. it is High Treaſon; for being a like caſe, it was to be declared by Parliament.

Forging [f] or counterfeiting of forraine money, which is not currant within the Realme, is miſpriſion of Treaſon, and the offender ſhall forfeit, as for concealement of High Treaſon.

¶ Sa money.] [g] This extendeth only to the Kings money coyned within this Realme; and therefore after this ſtatute, if a man had counterfeited the money of another kingdome, though it were currant within this Realme, it was no treaſon, untill it was ſo declared by Parliament [h] in An. 1 Mariæ, and in An. 1 & 2 Ph. & M. and the ſaid Acts of 5 Eliz. & 18 El. do extend to forrain coyne currant within this Realme. And it is holden, that at the making of this ſtatute of 25 E. 3. there was no money currant within this Realme, but the Kings own coyne. [i] See the ſtatute called Statutum de moneta magnum, & ſtatutum de moneta parvum. And it is to be knowne, that if any doe counterfeit the Kings coyne contrary to this ſtatute of 25 E. 3. [k] he ſhall have the puniſhment of his body, but as in caſe of Petit Treaſon, that is, to be drawne and hanged till he be dead, but the forfeiture of his lands is as in other caſes of High Treaſon, for this ſtatute is but a declaration of the Common law, and the reaſon of his corporall puniſhment is, for that in this caſe he was only drawne and hanged at the Common law, but a woman in that caſe was to be burnt.

[l] The Abbot of Weſtenden in the County of Buckingham for counterfeiting and reſection of the Kings money, was adiudged to be drawne and hanged, and not quartered. The want of obſervation of the ſaid diſtinction hath made ſome to erre in their iudgement. Nota. This Act of 25 E. 3. maketh no expreſſion of the iudgement, therefore ſuch iudgement as was at the Common law either in caſe of High Treaſon or Petit Treaſon muſt be given.

But if one be attainted for diminiſhing of the Kings mony upon any of the ſtatutes made in Queen Maries time, or in the time of Queen Elizabeth, becauſe it is High Treaſon newly made, the offender ſhall have iudgement as in caſe of High Treaſon, which iudgement you may ſee in the firſt part of the Inſtitutes. Sect. 747.

[m] And when a woman commits High Treaſon and is quick with childe, ſhe cannot upon her arraignment plead it, but ſhe muſt either pleade not guilty, or confeſſe it: and if upon her plea ſhe be found guilty, or confeſſe it, ſhe cannot alleage it in arreſt of iudgement, but iudgement ſhall be given againſt her: and if it be found by an inqueſt of Matrons that ſhe is quick with childe, (for priviement enſent will not ſerve) it ſhall arreſt, and reſpite execution till ſhe be delivered, but ſhe ſhall have the benefit of that but once, though ſhe be againe quick with

[a] See Inter leges Athelſtani, ca. 14. Canut. cap 61. Britton cap. 5. fo. 10. b. See the Mirror, ca. 1. § 6. De la mony falſifie acc' with 3 H. 7. and ca. 5. § 1. and Fleta ca. 22. acc'

[b] Mirr. ca. 1 § 3. inter Artic. per viels royes brideious, Rot. Par. 17 E. 3. nu. 14. Vide hic poſtea, cap. 31. 45 E. 3. ca. 13. 9 H. 5. cap. 11. Stat. 1.

See the ſecond part of the Inſtitutes, ca. 20 Artic. ſuper Cart, and the expoſition upon the ſame

[c] 3 H. 5. ca. 6. 1 E 6. cap. 12. 5 Eliz. cap. 11.

[d] *Nota*, for wicked lucre and gain.

[e] 18 Eliz. cap. 1.

[f] 14 Eliz. cap. 3.

[g] See hereafter, cap. Principall & Acceſſory.

[h] 1 Mar. cap. 6. 1 & 2 Ph. & Mar. cap. 11.

[i] Ver. Mag. Carta, part. 2. fol. 38, 39, 40.

[k] Fleta lib. 1. c. 22 who wrote before this ſtatute which is but a law Declaratory, as it appeareth before. 23 Aſſ. p. 2. Dier 6 Eliz. Term. Tr. MS. *pro tonſura nouette trabe & pend.* Tr. 24 H. 8. in Juſtice Spilmans Reports, accord,

[l] Mich. 31 E. 3. coram rege. Rot. 55. Buck. within 6 yeares after making of our ſtatute.

[m] 25 E. 3. 42. b. Cor. 130. 23 Aſſ. p. 2. 22 Aſſ. p. 71. 22 E. 3. Cor. 253. 12. Aſſ. p. 11. 8 E. 2. Cor. 410.

with childe: ſo as this reſpite of execution for this cauſe is not to be granted, only in caſe of felony, whereof Juſtice Stanford ſpeaketh, but in caſe of High Treaſon, and Petit Treaſon alſo.

Stanford f.ult.b.

¶ Si home port faux money en ceſt roialme, counterfeit au money dangliterre, & ſachant le money eſtre faux, &c.] By this branch ſix things are to be obſerved. First, that the bringing in of counterfeit money, and not the counterfeiting is expreſſed in this word [apport.] Secondly, that it muſt be brought from a foraine Nation, and not from Ireland, or other place belonging to, or being a member of the Crowne of England, and ſo it hath been reſolved, ſo wary are Judges to expound this ſtatute concerning Treaſon, and that in moſt benigne ſenſe: For albeit Ireland be a diſtinct Kingdome, and out of the Realme of England to ſome purpoſes, as to Protections and Fines levied, &c. as hath been ſaid: yet to ſome intent it is accounted as a member of or belonging to the Crowne of this Realme. And therefore a Writ of Error is maintainable here in the Kings Bench of a judgement given in the Kings Bench in Ireland, ſo as the Judges did conſtrue this ſtatute not to extend to falſe money brought out of Ireland. Thirdly, it muſt be to the ſimilitude of the money of England. Fourthly, that the bringer of it into this Realme, muſt know it to be counterfeit. Fiftly, Uttering of falſe money in England, though he know it to be falſe and counterfeit to the likeneſſe of the coyne of England, is no treaſon within this ſtatute, unleſſe he brought it from a foraine Nation, for the words be, ſi home apport faux money en ceſt realme. But if money falſe or clipped be found in the hands of any that is ſuſpicious, he may be impriſoned untill he hath found his warrant, per ſtatutum de moneta magn' vet. Mag. Chart. fo. 38. 2 parte. Laſtly, he muſt merchandize therewith, or make payment thereof, expreſſed in theſe words, Pur merchandizer, ou paiment faire in deceipt noſtre ſeignior le roy & ſon people. See more, De moneta regis, and of the derivation thereof in The ſecond part of the Inſtitutes, in Artic' ſuper cartas, cap. 20.

Vid. Hereafter, cap 30. Rot. Par. 17 E. 3. nu. 15.

7 H. 7. 10.

Lib. 7. Calvins caſe, *ubi ſupra.*

3 H. 7. 1b.

¶ Si home tuaſt Chancelour, Treſurer, ou Juſtice noſtre ſeigniour le roy del un banke ou del auter, Juſtice in Eire, ou daſſiſes & touts auters Juſtices aſſignes doſer & terminer eſteant en lour place ſeaſant lour office.]

In this caſe albeit one intend to kill any of theſe here named in their place, and doing their office, and thereupon ſtrike or wound any of them, this is no treaſon: For our ſtatute ſaith, Si home tuaſt Chancelor, &c. If a man kill the Chancellour, &c. For if it be treaſon, death muſt enſue. And the reaſon wherefore it is treaſon in theſe caſes is, becauſe ſitting judicially in their places, (that is, in the Kings Courts) and doing their office in adminiſtration of juſtice, they repreſent the Kings perſon, who by his Oath is bound that the ſame be done. And this Act extends only to the perſons here particularly named, and to no other: and therefore extendeth not to the Court of the Lord Steward, or of the Conſtable and Marſhall, nor to the Court of the Admiralty, or any other, nor to any Eccleſiaſticall Court. Nay, it extends not to the High Court of Parliament, if any Member of the Lords Houſe, or Houſe of Commons be ſlaine in his place, and doing his office, becauſe it is caſus omiſſus, and not mentioned in this Act. But in all thoſe Caſes it is wilfull murder, for the Law implyeth malice.

a Rot. Parliam. 20 E. 1 nu. 2. John de Britains caſe. 3 Reg. 21. 15. See *inter leges Alvredi*, cap. 4. *ubi ſupra. Vita & fortunis omnibus privator.* Cuſt. de Norm. c. 2. 14. 22 lib. Aſſ. pl. 49.

¶ Et ſoit aſſavoire q̄ in les caſes ſuiſnomes doit eē adjudge treaſon q̄ ſe extenda a noſtre ſeignior le roy & ſa royall Majeſtie: et de tiel treaſon le forfeiture des Eſcheates appertient a noſtre ſeignior le roy cibien des tres & tenements tenus des auters, come de luy meſme.

a ¶ Des tres & tenements tenus des auters come de luy meſme.] This is an affirmance of the Common Law, and the reaſon thereof is, for that the offence is committed againſt the ſoveraigne Lord the King, who is the light and the life of the Common-wealth: and therefore the Law doth

doth give to the King in ſatisfaction of his offence, all the Lands, &c. which the offender hath, and that no ſubject ſhould be partaker of any part of the forfeiture for this offence.

And where the words be [Lands and Tenements holden, &c.] yet the forfeiture extends to * rents charges, rents ſeck, Commons, Corrodies, and other hereditaments which are not holden, for in caſe of High Treaſon the tenure is not materiall.

This clauſe hath 7. limitations. Firſt, this Act extends not [b] to lands in tayle, (ſaving only for the life of tenant in tayle) but the forfeiture of eſcheats is to be underſtood of ſuch Lands and Tenements, as he might lawfully forfeit. And theſe generall words take not away the ſtatute of Donis conditional' [c] but latter ſtatutes give the forfeiture of eſtates in tail. 2. Nor doth this Act extend to uſes, but * latter ſtatutes doe name uſes. 3. [d] Nor to rights of actions, where the entrie is taken away, and ſo is the law clearly holden at this day. 4. Nor to any conditions, but by a [e] latter ſtatute conditions, unleſſe they be inſeparably knit to the perſon, be given to the King. 5. Nor to rights of entry, where any was in the lands [f] by title before the treaſon committed, but ſuch a right of entry is ſince given by latter ſtatutes. 6. Nor to Lands or Tenements, or Rights [g] in auter droit, as in the right of the Church, nor to lands in the right of a wife, but only during the coverture, and it extendeth to land which the offender hath [h] for life, for the forfeiture of the profits during his life. 7. It extendeth not to * a foundership of an houſe of religion in Free almoign, for that is annexed to the bloud of the Founder. Here goods and chattels be not named, but the forfeiture of them is implyed in the iudgement.

[1] Nota Lector, the ſaid Acts of 26 H.8. 33 H.8.5. and 6 E.6. doe yet remain in force, notwithſtanding the ſaid ſtatute of 1 Mar. as it hath been often adiudged and reſolved, and namely Mich. 21. Ja. in the Exchequer Chamber in a writ of error, upon a iudgement given in the Exchequer, between Ratcliffe, and the Lord Sheffeild, by all the Judges of England, and is agreeable to common experience.

See more of High Treaſon in the next Chapter following, cap. 2. verbo. Et pur ceo que pluſors auters caſes, &c.

* Brook Eſch. 9. See hereafter. *Verbo, Et de tiel manner de treaſon, &c.*

O herwiſe it is in caſe of Petit Treaſon and felony.

b 7 H. 4. 27. See hereafter in the title of *Premunire, Verbo* [des tres, &c.] Vid. 26 H. 8. cap. 13.

c 26 H. 8. ca. 13. in fine. 33 H. 8. ca. 20. 5 & 6 E. 6. ca. 11. Lib. 7. fo. 12, 13.

* 33 H. 8. ca. 20. 5 E. 6. ca. 11.

d Lib. 3. fo 210. 7 H. 4. 6 &c.

e 33 H. 8. c. 20. lib. 7. fo. 11. Engleſields caſe.

f *Engleſields caſe. Vbi ſupra.*

g 5 E 6 *ubi ſupra.* 1 Mar. Dier 123. Dier. 12 El. 289. Temps H. 8. Br. Coron. 5.

h 1 Mar. Dier 108. * 24 E. 3.

33. 72. Corody Br. 5. Temps H. 8. Eſcheat. 239. *i* 12 El. Dier 289. Lib. 3. fo. 10. 35. Lib. 7. fo. 33. 34. lib. 8. 72. 166. lib. 9. fo. 140. Stanf. Pl. Corone. 187. a.

CAP. II.

Of Petit Treaſon.

ET oveſque ceo il y ad un auter manner de treaſon, ceſtaſſavoir, quant un ſervant tua ſon maiſter, ou un feme tua ſon baron, ou quant home ſeculer ou de religion tua ſon prelate a que il doit foye et obedience. Et de tiel manner de treaſon la forfeiture des Eſcheats appertenont a cheſcun ſeignior de ſon fee proper, &c.

Britton ca. 8. & cap. 22.

And moreover there is another manner of Treaſon, that is to ſay, when a ſervant ſlayeth his Maſter, or a wife her husband, or when a man ſecular or religious ſlayeth his Prelate to whom he oweth faith

faith and obedience. And of ſuch treaſon the Eſcheats ought to pertain to every Lord of his own fee, &c.

a 12 Aſſ. p. 30. 21 E. 3 17. F. coron. 447. Statham tit. cor. 21 E. 3. 22 Aſſ. p. 49.

It was called High or Grand treaſon in reſpect of the royall Maieſty againſt whom it is committed, and comparatively it is called Petit Treaſon (whereof now this ſtatute ſpeaketh) in reſpect it is committed againſt ſubjects and inferiour perſons, whereof this Act doth enumerate three kinds.

b 19 H. 6. 47. Pl. Com. 86. b. Dier. 3 Mar. 128. 7 El. 235.

¶ Quant un ſervant tua ſon Maiſter.] This was Petit Treaſon by the Common Law, for ſo it appeareth by the [a] book of 12. Aſſ. that a woman ſervant killed her Miſtris, wherefore ſhe had judgement to be burnt, which is the judgement at this day of a woman for Petit treaſon. And herewith agreeth 21 E. 3. where the reader muſt know, that in ſtead of Mere in that caſe you muſt read Maiſter.

c Exodus, c. 21. v. 15. 17. Lev. 20. v. 9. 1 Mar. per Bromley & Portman of the report of Juſtice Daliſon. vid. 1 R. 3. 4. *In culeo paricidæ cum ſimia, cane, gallo, & ſerpente incluſi mari olim mergebantur: ſed vos non habemus talem conſuetudinem.*

[b] And upon this Act, if the ſervant kill the wife of his Maſter, it is Petit treaſon, for he is ſervant both to the husband and wife.

[c] If the child commit Parricide in killing of his father or mother (which the Law-makers never imagined any childe would doe) this caſe is out of this ſtatute, unleſſe the childe ſerved the father or mother for wages, or meat, drink or apparell, for that it is none of theſe three kinds ſpecified in this Law. And yet the offence is far more hainous and impious in a child then in a ſervant, for Peccata contra naturam ſunt graviſſima: but the Judges are reſtrained by this Act, to interpret this Act, à ſimili, or à minore ad majus, as hereafter ſhall be ſaid. And * ſome ſay that Parricide was petit treaſon by the Common Law.

* 22 E. 1. Math. Par. 874.

d 33 Aſſ. p. 7. Li. 1. f. 99. *Shelly's* caſe. 10 H. 6. 47. pl. com. 260.

[d] A ſervant of malice intended to kill his Maſter, and lay in wait to doe it whileſt he was his ſervant, but did it not till a year after he was out of ſervice, and it was adjudged Petit treaſon within this Act.

e 15 E. 2. Coron. 383. 19 H. 6. 47. See c. Pr. & Acc' Dier. 34 H. 8 50. Dier. 16 El. 332. Saunders caſe. Paſch. 32 E. 3. Rot. 62. coram rege. Ph. Cliftons caſe.

¶ Un feme tua ſon baron.] [e] This was petit treaſon by the Common Law, as it appeareth in our books. If the wife procure one to murder her husband, and he doth it accordingly, in this caſe the wife being abſent is but acceſſory, and ſhall be hanged and not burnt, becauſe the acceſſory cannot be guilty of Petit treaſon, where the principall is not guilty but of murder: and the * acceſſory muſt follow the nature of the principall: but if he that did the murder had been a ſervant of the husband, it had been treaſon in them both, and the wife ſhould have been burnt. And ſo it is in the caſe before of a ſervant, and in the caſe hereafter of a Clerk.

* 40 Aſſ. p. 15.

If the wife and a ſtranger kill the husband, it is Petit treaſon in the wife, and murder in the ſtranger, and ſo it is in the caſe of the ſervant next before, and of the Clerk next after.

Fleta li. 1. ca. 22. Britton fo. 16.

Before this ſtatute it was Petit treaſon, ſi quis falſaverit ſigillum domini ſui de cujus familia fuit. Britton agreeth herewith. But theſe are taken away by this Act, and all other ſaving theſe, that are here expreſſed.

19 H. 6. 47.

¶ Quant home ſeculer ou de religion tua ſon prelate a que il doit foy et obedience.] This clauſe is underſtood only of an Eccleſiaſticall perſon, be he ſecular, or regular, if he kill his Prelate, or Superiour, to whom he oweth faith, and obedience, it is Petit Treaſon: and ſo it was at the Common Law. And Petit Treaſon doth preſuppoſe a truſt, and obedience in the offender, either Civill, as in the wife and ſervant, or Eccleſiaſticall, as in the Eccleſiaſticall perſon.

40 Aſſ. ubi ſupra. & 16 El. ubi ſup.

Aidors, abettors, & procurers of any of theſe Petit Treaſons, are within this Law.

19 H. 6. 47. by all the Judges.

If the ſervant kill his Miſtris, viz. his Maſters wife, this is treaſon (as hath been ſaid) not by equity, for that is denied as well in Petit Treaſon, as High Treaſon, but it is within the letter of this ſtatute, for ſhe is a Maſter.

In High Treaſon there is no acceſſories, but all be principalls. and there-

fore

fore whatſoever act or conſent will make a man acceſſory to a felony, before the act done, the ſame will make him a principall in caſe of High Treaſon. But in caſe of Petit Treaſon, there may be acceſſories, either before, or after the act done, as in caſe of Murder or Homicide.

Here it appeareth that Acts of Parliament may bind men of the Church, Secular, or Regular, & no benefit of Clergy allowed unto them in caſe of treaſon: but [a] hereof you ſhall read at large in the Expoſition of the 15. chapter of Articuli cleri.

a See the 2. pt of the Inſtitutes. Artic. cleri. ca. 15. Hil. 3 R. 2. coram rege Rot. 8. London. Jo. Imperials caſe.

¶ Et de tiel manner de treaſon forfeiture des Eſcheats apperteinont a cheſcun ſeignior de ſon fee proper.] See hereof hereafter in the chapter of Forfeiture. [b] If a man ſeiſed in fee of a Fair, Market, Common, rent, charge, rent ſeck, Warren, Corrody, or any other inheritance, that is not holden, and is attainted of felony, the King ſhall have the profits of them during his life: but after his deceaſe, ſeeing the blood is corrupted, they cannot deſcend to the heir, * nor can they eſcheat becauſe they be not holden, they periſh and are extinct by Act in law: For in Eſcheats for Petit Treaſon or felony, a tenure is requiſite, as well in the caſe of the King, as of the ſubject.

For Eſcheats ſee the 1. part of the Inſtitut. Sect. 1. fo. 13. a.
b See before ca. 1. verbo, Des terres & tenements, &c.

* See 1. pt of the Inſtitutes fo. 13. verb. Averala terre per eſcheat. Mic. 4 H. 4. coram rege. Rot. 22. Anglia.

An Approver in caſe of felony, refuſing the combate with the Appellee, ſhall have like judgement that is for Petit Treaſon, Probator recuſans duellum adjudicatur ſuſpendi, & trahi in odium falſæ accuſationis: but yet it is not Petit Treaſon, becauſe it is none of the three ſpecified in this Act.

The caſe which Shard reciteth in 40 Aſſ. that a Norman being Leader of an Engliſh ſhip, who had Engliſh men with him, and robbed divers upon the ſea, and were taken and found guilty: and as to the Norman it was but felony (becauſe Normandy was loſt by King John, and was out of the ligeance of E. 3.) and as to the Engliſh it was adjudged treaſon, and the offenders drawn and hanged, which was the judgement of Petit Treaſon: but this caſe muſt be intended to fall out before this ſtatute of 25 E. 3. for it is none of the Petit Treaſons mentioned in this Act.

40 Aſſ. 25. Vide 2 H. 5. cap. 6.

¶ Et pur ceo que pluſors auters caſes de ſemblables treaſon purront eſcheer en temps avener, queux home ne purra penſer ne declarer en preſent: Aſſentu eſt, que ſi autre caſe ſuppoſe treaſon, que neſt eſpecifie paramount, aviegne de novel devant aſcun Juſtice, demoerge le Juſtice ſans aler a judgment de treaſon, tanque per devant noſtre ſeignior le roy en ſon Parliament ſoit le caſe mre & declare, le que le ceo doit eſtre adjudge treaſon, ou auter felony.

Rerum progreſſus oſtendunt multa, quæ initio prævideri non poſſunt.

And becauſe that many other like caſes of treaſon may happen in time to come, which a man cannot think nor declare at this preſent time: It is accorded, that if any other caſe ſuppoſed treaſon, which is not above ſpecified, doth happen before any Juſtice, the Juſtice ſhall tarry without going to judgement of the treaſon, till the cauſe be ſhewed and declared before the King and his Parliament, whether it ought to be judged treaſon or other felony.

¶ Semblable treaſon.] In this caſe, the Judges ſhall not judge à ſimili, or by equity, argument, or inference of any treaſon. High or Petit, for no like caſe ſhall be adjudged treaſon, &c. And note this branch extendeth (as hath been ſaid) to the offence, viz. treaſon, and not to tryall, judgement, or execution.

¶ Si auter caſe ſuppoſe treaſon.] No other caſe, though of as high or higher nature, &c. ſhall be adjudged treaſon High or Petit, as before it appeareth in the caſe of Particide, Anno 1 Mariæ, ubi ſupra.

¶ Treaſon.] Either High Treaſon, or Petit Treaſon, ſo as this branch extendeth as hath been ſaid to the offence of treaſon only.

¶ Que

¶ Que neſt ſpecifie paramount.] This word [ſpecifie] is to be ſpecially obſerved, for it is as much to ſay, as particularized, or ſet downe particularly: ſo as nothing is left to the conſtruction of the Judge, if it be not ſpecified and particularized before by this Act. A happy ſanctuary or place of refuge for Judges to flye unto, that no mans blood and ruine of his family do lie upon their conſciences againſt law. And if that the conſtruction by arguments à ſimili, or à minori ad majus had been left to Judges, the miſchiefe before this ſtatute would have remained, viz. diverſity of opinions, what ought to be adjudged treaſon, which this ſtatute hath taken away by expreſſe words: and the ſtatute of 1 Mar. doth repeale all treaſons, &c. but only ſuch as be declared and expreſſed in this Act of 25 E. 3. wherein this word [expreſſed] is to be obſerved.

See the expoſition upon the ſtatute *De frang. priſonam.* 1 H. 6. 5. 9 E. 4. 26, &c. See 1 Mar. of Juſtice Daliſons Report, ubi ſupra.

1 Mar. cap. 1.

In the Parliament holden Anno 5 H. 4. the Earle of Northumberland came before the King and Lords in Parliament, and by his Petition to the King, acknowledged to have done againſt his allegiance: and namely, for gathering of Power and giving of Liveries, whereof he prayeth pardon: and the rather, that upon the Kings Letters he yeelded himſelfe, and came to the King unto Yorke, where he might have kept himſelfe away. The which Petition the King delivered to the Juſtices by them to be conſidered. Whereupon the Lords made proteſtation, that the order thereof belonged to them, as Peers of the Parliament, to whom ſuch judgement belonged in weighing of this ſtatute of 25 E. 3, &c. and they judged the ſame to be no treaſon, nor felony, but only treſpaſſe finable at the Kings will. And the opinion in 27 Aſſ. is denied, that if one of the Indicters diſcover the counſell of the King, that it ſhould be treaſon; becauſe it is not ſpecified before in this Act, and therefore neither High Treaſon, nor Petit Treaſon.

Rot. Parl. 5 H. 4. nu. 11, 12. See nu. 15. Ibid.

27 Aſſ. p. 63.

¶ Tanque per devant le roy & ſon Parliament.] By this it is apparent, that any like or other caſe ought to be declared by the whole Parliament, (and not by the King and Lords of the Upper-Houſe only, or by the King and the Commons, or by the Lords and Commons.) And ſo was it done by the whole Court of Parliament in 3 R. 2. ubi ſupra. 5 Eliz. 18 Eliz. ubi ſupra, and many other Acts of Parliament.

John Duke of Gwyen and of Lancaſter, Steward of England, and Thomas Duke of Glocester, Conſtable of England, the Kings Uncles, complained to the King, that Thomas Talbot Knight, with other his adherents, conſpired the death of the ſaid Dukes in divers parts of Cheſhire, as the ſame was confeſſed and well knowne, and prayed that the Parliament might judge of the fault (which Petition was juſt, and according to this branch of the ſtatute of 25 E. 3.) but the Record ſaith further: whereupon the King and Lords in the Parliament adjudged the ſame fact to be open and High Treaſon: which judgement wanting the aſſent of the Commons, was no declaration within this Act of 25 E. 3. becauſe it was not by the King and his Parliament according to this Act, but by the King and Lords only.

Rot. Par. 17. R. 2. nu. 10.

¶ Soit le caſe monſtre & declare, &c.] This Declaration may be abſolute, or ſub modo, for a time.

13 El. cap. 1, 2. 14 El. ca. 1, 2, &c.

By this which hath been ſaid it manifeſtly appeareth, what damnable and damned opinions thoſe were concerning High Treaſon, of Treſilian Chiefe Juſtice of the Kings Bench, Sir Robert Belknap Chiefe Juſtice of the Common Bench, Sir John Holt, Sir Roger Fulthorp, and Sir William Burghe, Knights, fellowes of the ſaid Sir Robert Belknap, and of John Lockton one of the Kings Serjeants, that were given to King R. the 2. at Nottingham, in the Eleventh yeare of his reigne. But more deteſtable were the opintons of the Juſtices in 21 R. 2. and of Hanckford and Brinchley the Kings Serjeants, (and the rather, becauſe they took no example by the puniſhment of the former) which affirmed the ſaid opinions to be good and lawfull, ſaving Sir William Thirning

Anno 21 R. 2. in Latin.

11 R. 2. ca. 1. & 4.

Chiefe

Chiefe Juſtice of the Common Bench gave this anſwer: That declaration of treaſon not declared belongeth to the Parliament; but to pleaſe, he ſaid, that if he had been a Lord or a Peer of Parliament, if it had been demanded of him, he would have made the like anſwers. Theſe Juſtices and Serjeants being called in queſtion in the Parliament holden Anno 1 H. 4. for their ſaid opinions, anſwered (as divers Lords Spirituall and Temporall did) that they durſt no otherwiſe do, for feare of death. It was thereupon enacted, that the Lords Spirituall and Temporall, or Juſtices, be not from thenceforth received to ſay, that they durſt not for feare of death to ſay the truth. Which opinions being ſo manifeſtly againſt our ſaid Act of 25 E. 3. afterwards in the Parliament holden 1 H. 4. it is affirmed by authority of Parliament, that in the ſaid Parliament of 21 R. 2. divers Statutes, Judgements, Ordinances, and Stabliſhments were made, ordained, and given, erroniouſly and dolefully in great diſheriſon and finall deſtruction and undoing of many honourable Lords, and other liege people of this Realme, and of their heires for ever. And therefore not only that Parliament of 21 R. 2. and the circumſtances and dependances thereupon, are wholly reverſed, revoked, voided, undone, repealed, and adnulled for ever, but alſo the Parliament holden in 11 R. 2. by authority of which Parliament, Treſilian, Belknap, and the reſt of thoſe falſe Juſtices and Serjeants aforeſaid were attainted, is confirmed, for that it was (as there the Parliament affirmeth) for the great honour and common profit of the Realme.

Rot Parl. 1 H. 4. nu. 97. *Melius eſt omnia mala pati quam malo conſentire.*

1 H. 4. ca. 3.

See the conſequence of erroneous opinions in caſe of high treaſon. 1 H. 4 ca. 4.

¶ Et ſi per caſe aſcun home de ceſt roialme chivache armee, &c.] And if percaſe any man of this Realme ride armed, &c. For expoſition hereof, ſee the Chapter hereafter againſt riding or going armed.

For the better inſtruction of the Reader to diſcerne what offences be High Treaſon or Petit Treaſon at this day, it ſhall be neceſſary to adde hereunto the ſtatute of 1 Mar. whereby it is enacted, [That no Act, Deed, or Offence, being by Act of Parliament or Statute made treaſon, petit treaſon, or miſpriſion of treaſon, by words, writing, ciphering, deeds, or otherwiſe whatſoever, ſhall be taken, had, deemed, or adjudged to be High Treaſon, Petit Treaſon, or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon, in or by the Act of Parliament or Statute made in the 25 yeare of the raigne of the moſt noble King of famous memory, King Edward the third, touching or concerning treaſon, or the declaration of treaſon, and none other, &c. Any Act or Acts of Parliament, Statute, or Statutes, had or made at any time heretofore or after the ſaid 25 year of King E. 3. or any other declaration or matter to the contrary in any wiſe notwithſtanding.]

1 Mar. ca. 1. *Seſſione prima.* The like ſtatute was made, *Anno* 1 E. 6. ca. 12. See the ſtatute of 1 H. 4. ca. 10. to the like effect.

Before this Act ſo many treaſons had been made and declared by Act of Parliament ſince this Act of 25 E. 3. ſome in particular, and ſome in generall, and in ſuch ſort penned, as not only the ignorant and unlearned people, but alſo learned and expert men were many times trapped and ſnared: and ſometimes treaſons made or declared in one Kings time, were abrogated in another Kings time, either by ſpeciall or generall words: ſo as the miſchief before 25 E. 3. of the uncertainty what was treaſon, and what not, became to be ſo frequent and dangerous, as the ſafeſt and ſureſt remedy was, by this excellent Act of 1 Mar. to abrogate and repeale all, but only ſuch as are ſpecified and expreſſed in this ſtatute of 25 E. 3. By which law, the ſafety both of the King and of the ſubject, and the preſervation of the Common-weale is wiſely and ſufficiently provided for, in ſuch certainty, as Nihil relictum eſt arbitrio Judicis. And certainly the two Rules recited in the Preamble of the ſaid Act of 1 Mariæ, are aſſuredly true. The firſt, [That the ſtate of a King ſtandeth and conſiſteth more aſſured by the love and favour of the ſubject toward their Soveraigne, then in the dread and fear of lawes made with rigorous pains and extreme puniſhment for not obeying their Soveraigne:] And the other, [That lawes juſtly made for the preſervation of the Common-weale without extreme puniſhment or penalty, are more often, and for the moſt part better obeyed and kept, then lawes and ſtatutes made

Inter leges Canuti cap. 7. *Inprimis juſtæ leges ut efferantur injuſtæ deprimentur.* Aliter in antiquo MS. *Inprimis ut juſtæ leges erigantur, injuſtæ ſubvertantur.*

Seneca. with great and extreme punishment.] Mitiùs imperanti melius paretur.

In which Act five notable things are to be obſerved. Firſt, it extendeth (without exception) to all High Treaſons made by any Act of Parliament ſince the ſaid Act of 25 E. 3. Secondly, to all declarations of High Treaſons by any Act of Parliament ſince the ſaid Act of 25 E. 3. (as of the ſaid Declaration in 3 R. 2. of killing an Ambaſſadour and the like.) Thirdly, to all Petit Treaſons made or declared by any Act of Parliament ſince the ſaid Act of 25 E. 3. Fourthly, albeit miſpriſion of treaſon is not mentioned in the Act of 25 E. 3. yet every miſpriſion of any treaſon made or declared ſince that Act by any Act of Parliament, is abrogated. Fifthly, no offence to be treaſon, petit treaſon, or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon by the ſaid Act of 25 E. 3. Here three things are to be obſerved: firſt, that this word [expreſſed] excludeth all implications or inferences whatſoever. Secondly, here miſpriſion of treaſon is taken for concealement of high treaſon or petit treaſon, and only of high treaſon or petit treaſon ſpecified and expreſſed in the Act of 25 E. 3. Thirdly, that no former judgement, attainder, preſident, reſolution, or opinion of Judges or Juſtices of high treaſon, petit treaſon, or miſpriſion of treaſon, other then ſuch as are ſpecified and expreſſed in the ſaid Act of 25 E. 3. are to be followed or drawne to example: for the words be direct and plaine, [That from henceforth, no Act, Deed, or Offence, &c. ſhall be taken, had, deemed, or adjudged to be treaſon, petit treaſon, or [a] miſpriſion of treaſon, but only ſuch as be declared and expreſſed in the ſaid Act of 25 E. 3, &c. any Act of Parliament or Statute after 25 E. 3. or any other declaration or matter to the contrary notwithſtanding.] So as there is no high treaſon, petit treaſon, or miſpriſion of any treaſon made or declared by any Act of Parliament or otherwiſe ſince the Act of 25 E. 3. but only ſuch as have been made ſince the ſaid Act of 1 Mariæ, and of thoſe, only ſuch as were made [b] perpetuall, and not during the life of Queen Mary or of Queen Elizabeth, whereof there be divers which now are expired, which you may reade being all in print. But there wanted nothing to the perfection of the Statute of 25 E. 3. but a limitation of ſome certaine time wherein the offender ſhould be accuſed. [c] Poſt intervallum temporis accuſator non erit audiendus, niſi docere poteſt ſe faiſſe juſtis rationibus impeditum.

¶ Or the declaration of treaſon, &c. [d] Declarations made during the naturall life of Queen Elizabeth ceaſed by her death: for Declarations may have limitations as well as Statutes introductory of new lawes.

There is another excellent branch of a Statute made [e] in 1 & 2 Ph. & Mar. in theſe words. [And be it further enacted by the authority aforeſaid, that all trials hereafter to be had, awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the Common Law.]

℄ All trials.] [f] Upon theſe words many things have been obſerved by others. Firſt, that the Letter of this Act extendeth only to triall of high treaſons, or petit treaſons, and not to miſpriſion. Secondly, Forraine treaſons are to be tried by the ſtatute [g] of 35 H. 8. cap. 2. and ſo it was reſolved by all the Juſtices of England in Ourks Caſe, and had been ſo reſolved before. But for trials of treaſons to be had in Wales, or where the Kings Writ runneth not, in ſuch Shires as the King ſhall aſſigne by his Commiſſion by the * ſtatute of 32 H. 8. ca. 4. are abrogated by this Act, becauſe they are triable by the law.

[h] It hath been holden, that upon the triall of miſpriſion of treaſon there muſt be two lawfull witneſſes, as well upon the triall, as upon the indictment, as it was reſolved by the Juſtices in the Lord Lumleyes Caſe, Hil. 14. Eliz. reported by the Lord Dier, under his own hand, which we have ſeen, but left out of the print, which for other purpoſes is cited hereafter. Thirdly, it hath beene holden, that this Act extendeth not to the Indictment of any treaſon, but to the triall by Peers, if the offender be noble: or by Freeholders, if the offender be under the degree of nobility: [i] therefore upon the indictment which is in manner of an accuſation

[a] That is, of ſuch treaſon, high or petit, as is expreſſed in the Act of 25 E. 3. and of no other treaſon.
[b] 1 Mar. ca. 6. 1 & 2 Ph. & Mar. cap. 11. 5 Eliz. ca. 1. & 11 18 Eliz. cap. 1. 13 Eliz. cap. 2. 23 Eliz. cap. 1. 27 Eliz. ca. 2. 3 Jac. cap. 4.
[c] Bracton lib. 3. fol. 118. b.
[d] 13 Eliz. cap. 1. 14 Eliz. cap. 1. & cap. 2.
[e] 1 & 2 Ph. & M. cap. 10.
[f] See the ſecond part of the Inſtitutes, Mag. Carta. cap. 29. Verbo (per judicium parium.)
[g] 35 H. 8. ca. 2. 3 Mar. Dier 132. lib. 7. fo. 23. in Calvins caſe. Paſch. 33 Eliz. Orurks caſe.
* 32 H. 8. cap. 4.
[h] 1 E. 6. ca. 12. 5 E. 6. ca. 11. Both which are mentioned in the next Section. Hill. 14. Eliz. Dier MS.
Nota. This is the laſt reſolution of the Judges in this point. At this time *Catlin* and *Dier* were Chiefe Juſtices, and *Sanders* Chiefe Baron, &c.

accuſation, by the ſtatutes of 1 E.6. and 5 E.6. two lawfull witneſſes are requiſite: the words of the ſtatute of 1 E.6. in the laſt branch be, [That none ſhall be indicted, arraigned, condemned, or convicted for any treaſon, Petit Treaſon, miſpriſion of treaſon, or for any words before ſpecified to be ſpoken, after the ſaid firſt day of February, for which the ſame offender or ſpeaker ſhal in any wiſe ſuffer pains of death, impriſonment, loſſe or forfeiture of his goods, chatels, lands, or tenements, unleſſe he be accuſed by two ſufficient and lawfull witneſſes, or ſhall willingly without violence confeſſe the ſame.]

1 E.6.cap.12. 5 E.6.ca.11. See 13 El.ca.1. See before *Verb.* [*De ceo provable-ment ſoit attaint.*]

Nota that [before ſpecified] doe refer to the words mentioned before in the Act. 1. It is manifeſt by the connexion of the words, viz. [for any words before ſpecified to be ſpoken, &c.] 2. The treaſons in 25 E.3. were mentioned before. 3. The firſt words be [for any treaſon, Petit treaſon, miſpriſion of treaſon, &c.]

And by 5 E.6. ca.11. it is provided by the laſt clauſe ſave one, [That none ſhall be indicted, arraigned, condemned, convicted, or attainted for any of the treaſons or offences aforeſaid, or for any * other treaſons that now be, or hereafter ſhal be, which ſhall hereafter be perpetrated, committed, or done, unleſſe the ſame offender be thereof accuſed by two lawfull accuſers, &c. unleſſe the ſaid party arraigned ſhall willingly, without violence confeſſe the ſame.] Here two things are to be obſerved. 1. The particular penning of both theſe Acts, viz. indicted, arraigned, convicted, &c. and the words of 1 & 2 of Ph. & Mar. extend to tryals only, & not to the indictment. 2. Two lawfull accuſers in the Act of 5 E.6. are taken for two lawfull witneſſes, for by two lawfull accuſers, and accuſed by two lawfull witneſſes (as it is ſaid 1 E.6.) is all one: which word (accuſers) was uſed, becauſe two witneſſes ought directly to accuſe, that is, charge the priſoner, for other accuſers have we none in the Common Law: and therefore lawfull accuſers muſt be ſuch accuſers as Law allow. And ſo was it reſolved in the Lo. Lumleys caſe by the Juſtices: for if accuſers ſhould not be ſo taken, then there muſt be two accuſers, by 5 E.6. and two witneſſes by 1 E.6. And the ſtrange conceit in 2 Mar. that one may be an accuſer by hearſay, was utterly denied by the Juſtices in the Lo. Lumleys caſe. And this word [awarded] in the ſtatute of 1 & 2 Ph. & Mar. extendeth to the tryall upon the arraignment, and not to the indictment, for that is not ſaid to be awarded.

See 1 El.ca.6. Stanf. Pl.Coron. 89. & 164. 4 Mar.Coron. Br.220.Dier. 2 Mar.99.& 3 Mar.132.

* Nota the generality of theſe words. *Regula. Verba generalia generaliter ſunt intelligenda.* See hereafter c. 49. of Piracy, &c.

Hil.14.El Lo. Lumleys caſe. Ubi ſupra. 2 Mar. Dier. 99. 100. Thomas Caſe.

And it was reſolved by all the Juſtices in [a] Rolſtons caſe upon the rebellion in the North, that theſe words [ſhall willingly without violence confeſſe the ſame] are to be underſtood where the party accuſed upon his examination before his arraignment, willingly confeſſed the ſame without violence, that is, willingly without any torture: and is not meant of a confeſſion before the Judge, for he is never preſent at any torture, neither upon his arraignment was ever any torture offered. And here commeth another [b] ſtatute made in 1 & 2 Mar. to be conſidered, by which it is provided, that treaſon for the counterfeiting and impairing of the coin current in this Realm, &c. the offender therein, &c. ſhall be indicted, arraigned, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as hath been uſed and accuſtomed within this Realm, at any time before the firſt year of King E.6. &c. Wherein the ſpeciall penning of this Act is to be obſerved, which in caſe of treaſon concerning the counterfeiting or impairing of coin, &c. hath by particular words reſtored the evidence requiſite by the Common Law, before the ſtatute of 1 E.6. as well upon the indictment as the triall. But the Act of 1 & 2 Ph. & Mar. cap. 10. extends to trialls only in other caſes of High Treaſon, and therefore that Act extendeth not to the indictment of other High treaſons. Alſo it is moſt neceſſary (as many doe hold) that there ſhould be two lawfull accuſers, that is, two lawfull witneſſes at the time of the indictment, for that it is commonly found in the abſence of the party accuſed, and it may be when the party ſuſpected is beyond ſea, or in remote parts, and may be outlawed thereupon; and therefore ſeeing the indictment is the foundation of all, it is moſt neceſſary to have ſubſtantiall proof in a cauſe ſo criminall, where probationes oportent eſſe luce clariores.

a Mich. 13 & 14 El. Rolſtons caſe.

b 1 & 2 Ph. & Mar.c.11.ſupra.

1 & 2 Ph.& Ma. cap.10.

Laſtly,

Lastly, if the indictment were part of the tryall, then ought he that is noble, and a Lord of Parliament be indicted of High Treaſon, &c. by his Peers: For the tryall of him (without queſtion) muſt be by his Peers: but the indictment of Peers of the Realm is always by Free-holders, and not by their Peers, as hereafter ſhall appear. We have been the longer herein in reſpect of ſome variety of opinion (for want of due and intire conſideration had of all and every part of that which hath been ſaid) upon ſerious ſtudy touching this point, without reſpect of a common wandring opinion.

And it ſeemeth that by the ancient Common law one accuſer, or witneſſe was not ſufficient to convict any perſon of High Treaſon: [a] For in that caſe, where is but one accuſer, it ſhall be tried before the Conſtable and Marſhall by Combat, as by many records appeareth. [b] But the Conſtable and Marſhall have no juriſdiction to hold plea of any thing, which may be determined or diſcuſſed by the Common Law. And that two witneſſes be required, appeareth by our [c] books, and I remember no authority in our books to the contrary: and the Common law herein is grounded upon the law of God expreſſed both in the old and new Teſtament: [d] In ore duorum aut trium teſtium peribit qui interficietur: Nemo occidatur uno contra ſe dicente teſtimonium.

And this ſeemeth to be the more clear in the triall by the Peers, or Nobles of the Realm, becauſe they come not de aliquo vicineto, whereby they might take notice of the fact in reſpect of vicinitie, as other Jurors may doe.

Having now rehearſed what others have ſaid and holden, we upon due conſideration had of the whole matter will ſet down our own opinion, and reaſons, in theſe Four points following. Firſt, that the ſtatute of [e] 5 E. 6. cap. 11. is a generall law, and extends to all High treaſons, as well by the Common Law declared by the ſtatute of 25 E. 3. as to any other ſtatute made or to be made, the negative words of which ſtatute be: [No perſon ſhall be [f] indicted, arraigned, convicted, condemned, or attainted for any treaſon, that now is, or hereafter ſhall be, &c.] Which words without all queſtion are generall, and ſo to be taken. The words of that ſtatute be further, [Unleſſe the ſame offender be accuſed by two lawfull accuſers,] Theſe two lawfull accuſers are in judgement of law taken for two lawfull witneſſes, and that for two cauſes: Firſt, they muſt be lawfull, that is, allowed by the Laws of the Realm: and by the law, upon the arraignment of the Priſoner upon the indictment of treaſon, no other accuſer can be heard, but witneſſes only. Secondly, the words of the ſtatute are [Which ſaid accuſers at the time of the arraignment of the party accuſed, if they be then living, ſhall be brought in perſon before the party ſo accuſed, and avow, and maintain that which they have to ſay to prove him guilty of the treaſon, unleſſe the party arraigned ſhall willingly without violence confeſſe the ſame,] as by that Act it appeareth. Now to avow and maintain that which they have to ſay, to prove him guilty of the treaſon, is the proper office and duty of witneſſes, and ſo it is ſaid in the ſtatute of [g] 1 E. 6. c. 12. in the laſt clauſe (by two lawfull witneſſes.) See the ſtatute of 5 El. c. 1. where it is ſaid [accuſed by good and ſufficient teſtimony:] [h] to the ſame intent, the ſtatute of 1 & 2 Ph. & Mariæ ca. 11. for the word [accuſed.]

[i] Puniantur accuſatores penes dominum regem, quòd amodò Rex eis de facili non credat: et talis pœna fiat eis, qualis debeat fieri illis, qui injuſte fideles dñi regis exhæredari & deſtrui fecerunt, &c.

2. That this Act of 5 E. 6. extend as well to Petit Treaſon, as High Treaſon, for the words be [any treaſon] and ſo doth the ſtatute of 1 E. 6. ca. 12.

3. That the ſtatute of 1 & 2 Ph. & Mar. cap. 10. doth not abrogate the ſaid Act of 1 E. 6. or of 5 E. 6. For that Act of 1 & 2 Ph. & Mar. extends only to trialls by the verdict of twelve men de vicineto, of the place where the offence is alleadged, and [k] the indictment is no part of the triall, but an information or declaration for the King, and the evidence of witneſſes to the Jury is no part of the triall, for by law the tryall in that caſe is not by witneſſes, but by the ver-

Sect. 194. See Forteſcue ca. 26, 27. Juries ought to be informed by evidences, and witneſſes.

dict

Se: Magna Cart. c. 29. and the expoſition thereupon.

[a] Pat. 25 E. 3. part. 1. nu. 16. Rot. Parl 21 R. 2. nu. 19. 21. the D. of Norff. caſe. Rot. Pat. 3 H. 4. Balleſhuls caſe. Rot. Vaſcon. 9 H. 4. nu. 14. John Bolemers caſe. Rot. Parl. 2 H. 6. nu. 9. the Earl of Ormonds caſe. Rot. Pat. 8 H. 6. pt. 2. m. 7. between Upton and Dowy. Vide the 4. part of the Inſtitutes. cap. the Court of Chivalry, &c. See Bract. lib. 3. fo. 119. 2.

[b] 13 R. 2. ca. 2.

[c] Mirror ca. 3. §. ordenance de attaint. Bract. l. 5. f. 354. 48 E. 3. 30. 35 H. 6. 46. Fort. ca. 32. 15 E. 4. f. 1. Pl. Com. fo. 8.

[d] Deu. 17. 6. 19. 15. Mat. 18. 16. Iohn 18. 23. 2 Cor. 13. 1. Heb. 10. 28.

[e] And ſo I hold the ſtatute of 1 E. 6. c. 12. to be a generall Law, and to extend to all high treaſons, &c.

[f] Nota as well upon the indictment as the arraignment of treaſon there ought to be two accuſers. See Dier 2 & 3 Ph. & Mar. 132.

[g] 1 E. 6. ca. 12. the laſt clauſe.

[h] 5 El. ca. 1. 1 & 2 Ph. & Mar. ca. 11. Bract. li. 3. f. 118. *Qui accuſat inte. gre fame ſit, & non criminoſus.*

[i] Star. de Kenelw. ſecunda parte Vet. Mag. Cart. cap. 16.

[k] See the firſt part of the Inſtitutes.

dict of twelve men, and ſo a manifeſt diverſity between the evidence to a Jury, and a tryall by Jury. And the word [awarded] in that Statute doth prove that that Act extended only to the Venire facias for trial, for neither the indictment nor the evidence can be ſaid to be awarded: Veritas quæ minime defenſatur, opprimitur, & qui non improbat, approbat. Et ſic libere animam meam liberavi.

[a] The tryal againſt an Alien nee, that lived here under the protection of the King, e amity being between both Kings, for High treaſon, ſhall by force of this Act of 1 & 2 Ph. & Mar. be tried according to the due courſe of the Common Law, and therefore in that caſe he ſhall not be tried per medietatem linguæ, as he ſhall be in caſe of Petit Treaſon, murder, and felony, if he prayeth it.

4. [b] That a tryall in a forein county upon examination before three of the Councell, &c. by the ſtatute of 33 H. 8. cap. 23. is abrogated by this Act of 1 & 2 Ph. & Mar. being a tryall contrary to the due courſe of the Common Law, which is to have it tryed by Jurours of the proper County, [c] but the indictment being found in the proper County, it may be by ſpeciall commiſſion heard and determined before Commiſſioners in any forein county, but the tryall muſt be by Jurours of the proper county; and this is warranted by the courſe of the Common Law. And albeit when the Term begins, all Commiſſions of Oier and Terminer in the county where the Kings Bench ſit, be ſuſpended during the Term, yet if an Indictment be found before ſuch Commiſſioners before the tearm, there may be a ſpeciall commiſſion made to commiſſioners in the ſame county, ſitting the Kings Bench in that county, to hear and determine the ſame during the tearm: for the Kings Bench hath no power to proceed thereupon, till the indictment be before them. And it is the better, if the ſpeciall commiſſion bear Teſte after the beginning of the tearm. Note a diverſity between generall commiſſions of Oier and Terminer, and ſuch a ſpeciall commiſſion; and the Court of Kings Bench may be adjourned, and in the mean time the Commiſſioners may ſit there.

[d] And where it is provided by the ſtatute of 33 H. 8. cap. 23. that peremptory challenge ſhould not from thenceforth be admitted or allowed in caſes of High Treaſon, or miſpriſion of treaſon: [e] This branch is abrogated by the ſaid Act of 1 Mar. For the end of challenge is to have an indifferent tryall, and which is required by law; and to bar the party indicted of his lawfull challenge, is to bar him of a principall matter concerning his tryall: and all Acts of Parliament concerning incidents to tryalls contrary to the courſe of the Common law, are abrogated by the ſaid words, [and that all trialls hereafter, &c.] but all this is to be underſtood of perſons under the degree of Nobility; For in caſe of a triall of a Noble man, Lord of Parliament, he cannot challenge at all any of his Peers.

[f] Henry Garnet Superiour of the Jeſuites in England upon his arraignment for the Powder Treaſon, did challenge Burrell a Citizen of London peremptorily, and it was allowed unto him by the reſolution of all the Judges, [g] So as in caſe of High Treaſon, or miſpriſion of High Treaſon, a man may challenge 35. peremptorily, which is under three Juries, but more he cannot.

Laſtly, all ſtatutes made before the ſaid Act of 1 & 2 Ph. & Mar. for tryall of High Treaſon, Petit Treaſon, or miſpriſion of Treaſon, contrary to the due courſe of the common law, are abrogated by the ſaid Act of 1 & 2 Ph. & Mar. and tryalls by the due courſe of the common law, with challenges incidents in thoſe caſes are reſtored.

[h] If a man be indicted of High Treaſon, he may at this day plead a forein plea, as he might doe by the common law, and ſhall be tryed in the forein county: but otherwiſe it is in caſes of Petit Treaſon, murder, or felony, for there it ſhall be tryed in the county where the indictment is taken.

And forasmuch as the proceeding againſt a noble Peer of the Realm, being a Lord of Parliament in ſome points agrees, and in other points differeth from the proceeding againſt a ſubject under the degree of Nobility: It ſhall be neceſſary to ſhew wherein they agree, and wherein they differ.

1. The

[a] 27 E. 3. ca. 8. 28 E. 3. ca. 18. 8 H. 6. ca. 29. 1 Mar. fo. 144. Shirleys caſe, & ſo it was reſolved by all the Judges Hil. 36 El. in the caſe of Doctor Lopez. Emanuel Loyſie, and Stephen Ferreira de Gama.

[b] 33 H. 8. c. 23. 3 Mar. Dier 132. Dier 12 El. 286. b. li. 11. fo. 63. a. in Doctor Foſters caſe.

[c] 27 Aſſ. p. 1. 21 Aſſ. p. 12. W. 1. c. 3. &c. Mic. 25 & 26 El. per les Juſtices in Somervile and Ardens caſe. Dier 12 El. 286. b. All this was reſolved Mic. 1. Ja. in Sir Walter Raleighs caſe. Pl. Com. 388. Count de Leiceſters caſe.

[d] 33 H. 8. c. 23.

[e] And ſo it was reſolved. An. 1 Ja. in Sir Walter Raleighs caſe, by all the Judges and had been reſolved ſo before. Stan. pl. cor. 157.

[f] 3 Ja. R. in Garnets caſe.

And ſo was it reſolved M. 25 & 26 El. in Somervile & Ardens caſe.

[g] Br. tit. Challenge 217. [h] 22 H. 8. c. 14. 32 H. 8. c. 3. See 4 H. 8. c. 2. and 22 H. 8. c. 2. pleading &c. for being taken out of Sanctuary in a forain county in caſe of murder or felony. See hereafter. ca. Sanctuary, all ſanctuaries taken away: & note that the ſtat. of 22 H. 8. &c. extēd only to Indictments and not to Appeals.

1 H.4.1. 1. The Noble Peer of the Realme muſt be indicted before Commiſſioners of Oier and Terminer, or in the Kings Bench, if the treaſon, miſpriſion of treaſon, felony, or miſpriſion thereof be committed in that County where the Kings Bench ſit, as it was reſolved in the caſe of Tho. D. of N. in An. 13. Eliz. And this is common to both degrees to be indicted by Jurors of that County where the offence was committed.

1 H.4.1. 10 E.4.6.b. 13 H.8.12. 2. When he is indicted, then the King by his Commiſſion under the Great Seale conſtitutes ſome Peer of the Realme, to be hac Vice, Steward of England: For his ſtile in the Commiſſion, is, (Seneſchallus Angliæ) who is Judge in this caſe of the treaſon or felony, or of the miſpriſion of the ſame committed by any Peer of the Realm. This Commiſſion reciteth the Indictment generally as it is found: and power given to the Lord Steward to receive the Indictment, &c. and to proceed, Secundum legem & conſuetudinem Angliæ. And a commandement is given thereby to the Peers of the Realme, to be attendant and obedient to him: and a commandement to the Lieutenant of the Tower to bring the priſoner before him.

3. A Certiorari is awarded out of the Chancery to remove the indictment it ſelfe before the Steward of England indilatè, which may either beare date the ſame day of the Stewards Commiſſion, or any day after.

4. The Steward directs his precept under his ſeale to the Commiſſioners, &c. to certifie the indictment ſuch a day and place.

5. Another Writ goeth out of the Chancery directed to the Lieutenant of the Tower, to bring the body of the priſoner before the Steward at ſuch day and place as he ſhall appoint.

6. The Lord Steward maketh a precept under his ſeale to the Lieutenant of the Tower, &c. and therein expreſſeth a day and place when he ſhall bring the priſoner before him.

7. The Steward maketh another precept under his ſeale to a Serjeant at Armes, to ſummon Tot & tales dominos, magnates, & proceres hujus regni Angliæ prædicti R. Comitis E. pares, per quos rei veritas melius ſciri poterit, quòd ipſi perſonaliter compareant coram prædicto Seneſchallo apud Weſtm. tali die & hora, ad faciend. ea quæ ex parte domini Regis forent facienda, &c. Wherein Four things are to be obſerved. Firſt, that all theſe precepts moſt commonly beare date all in one day. Secondly, that no number of Peers are named in the precept, and yet there muſt be Twelve or above. Thirdly, that the precept is awarded for the returne of the Peers before any arraignment or plea pleaded by the priſoner. Fourthly, that in this caſe the Lords are not de Vicineto, and therefore the ſitting and triall may be in any County of England. And herein are great differences between the caſe of a Peer of the Realme, and of one under the degree of Nobility.

1 H.4.1. 8. At the day, the Steward with ſix Serjeants at Armes before him takes his place under a Cloth of Eſtate, and then the Clerk of the Crown delivereth unto him his Commiſſion, who redelivereth the ſame unto him. And the Clerk of the Crown cauſeth a Serjeant at armes to make three Oyes, and commandement given in the name of the Lord High Steward of England to keep ſilence:

1 H.4.1. and then is the Commiſſion read. And then the Uſher delivereth to the Steward a white rod, who re-delivereth the ſame to him againe, who holdeth it before the Steward. Then another Oyes is made, & commandement given in the name of the High Steward of England, to all Juſtices and Commiſſioners to certifie all Indictments and Records, &c. Which being delivered into Court, the Clerk of the Crown readeth the return. Another Oyes is made, that the Lieutenant of the Tower, &c. returne his Writ and Precept, and to bring the priſoner to the Bar: which being done, the Clerk reads the returne. Another Oyes is made, that the Serjeant at armes return his precept with names of the Barons and Peers by him ſummoned, and the return of that is alſo read. Another Oyes is made, that all Earles, Barons and Peers (which by the commandement of the High Steward be ſummoned) anſwer to their names, and then they take their

places

places and ſit down, and their names are recorded: and the entry of the Record is, that they appear, Ad faciendum ea quæ ex parte Domini Regis eis injungentur. And when they be all in their places, and the priſoner at the Bar, the High Steward declares to the priſoner the cauſe of their aſſembly, and perſwades him to anſwer without feare, that he ſhall be heard with patience, and that juſtice ſhould be done. Then the Clerk of the Crown reades the Indictment, and proceeds to the arraignment of the priſoner, and if he plead not guilty, the entry is, Et de hoc de bono & malo ponit ſe ſuper Pares ſuos, &c. Then the High Steward giveth a charge to the Peers, exhorting them to try the priſoner indifferently according to their evidence. 1 H.4.1.

9. The Peers are not ſworn, but are charged, Super fidelitatibus, & ligeantiis Domino Regi debitis: for ſo the Record ſpeaketh.

10. Then the Kings learned Councell give evidence, and produce their proofes for the King againſt the priſoner.

11. But the priſoner, when he pleadeth not guilty, whereby he denieth the fact, he needs have no advice of Councell to that plea. But if he hath any matter of law to plead, as Humfrey Stafford in 1 H. 7. had, viz. The priviledge of Sanctuary, he ſhall have Councell aſſigned to him to plead the ſame, or any other matter in law: as to plead the generall pardon, or a particular pardon, or the like. And after the plea of not guilty, the priſoner can have no Councell learned aſſigned to him to anſwer the Kings Councell learned, nor to defend him. And the reaſon thereof is, not becauſe it concerneth matter of fact, for Ex facto jus oritur: but the true reaſons of the law in this caſe are: Firſt, that the teſtimonies and the proofs of the offence ought to be ſo clear and manifeſt, as there can be no defence of it. * Secondly, the Court ought to be in ſtead of councell for the priſoner, to ſee that nothing be urged againſt him contrary to law and right: nay, any learned man that is preſent may informe the Court for the benefit of the priſoner, of any thing that may make the proceedings erroneous. And herein there is no diverſity between the Peer and another Subject. And to the end that the triall may be the more indifferent, ſeeing that the ſafety of the priſoner conſiſteth in the indifferency of the Court, the Judges ought not to deliver their opinions before-hand of any criminall caſe, that may come before them judicially. And we reade, that in the caſe of Humfrey Stafford that arch-traytor, Huſſey Chiefe Juſtice, beſought King Henry the Seventh, that he would not deſire to know their opinions before-hand for Humfrey Stafford, for they thought it ſhould come before them in the Kings Bench judicially, and then they would do that which of right they ought: and the King accepted of it. And therefore the Judges ought not to deliver their opinions beforehand upon a caſe put, and proofs urged of one ſide in abſence of the party accuſed: eſpecially in caſes of high nature, and which deſerve ſo fatall and extreme punithment. For how can they be indifferent, who have delivered their opinions before-hand without hearing of the party, when a ſmall addition, or ſubſtraction may alter the caſe? And how doth it ſtand with their Oath, who are ſworn, That they ſhould well and lawfully ſerve our Lord the King and his people in the office of a Juſtice? and they ſhould do equall law, and execution of right to all his ſubjects, &c. See more of this matter in the 13 Section here following.

In Scotland in all criminall caſes, yea in caſes of High Treaſon, *Pars rea* may have Councell learned. Vide hereafter upon the ſtatute of 31 Eliz. concerning witneſſes.

* See more hereof ca. 63. Councell learned in Pleas of the Crown.

1 H.7.fo.26.

18 E.3.

12. There be alwayes either all, or ſome of the Judges ever attendant upon the High Steward, and ſit at the feet of the Peers, or about a Table in the middeſt, or in ſome other convenient place.

13. After all the evidence given for the King, and the priſoners anſwers, and proofs at large, and with patience heard: then is the priſoner withdrawn from the Bar to ſome private place under the cuſtody of the Lieutenant, &c. And after that he is withdrawn, the Lords that are tryers of the priſoner go to ſome place to conſider of their evidence: and if upon debate thereof, they ſhall doubt of any matter, and thereupon ſend to the High Steward to have conference with the Judges, or with the High Steward, they ought to have no conference, either with the Judges or the High Steward, but openly in Court, and in the preſence

Paſch. 26 H.8. in the caſe of the Lord Dacres of the North reported by Juſtice Spilman which we have ſeen.

ſence, and hearing of the Priſoner; as it was reſolved by all the Juſtices of England in the reign of King H. 8. in the caſe of the Lord Dacres of the North. And this was a juſt reſolution: for when the Lords ſhould put a caſe, and aſk advice thereupon, the priſoner ought by law to be preſent, to ſee that the caſe or queſtion be rightly put: and therefore that nothing be done in his abſence, untill they be agreed on their verdict. Hereupon it followeth, that if the Peers of the Realm, who are intended to be indifferent, can have no conference with the Judges, or with the High Steward in open Court in the abſence of the priſoner: à fortiori, the Kings learned Counſell ſhould not in the abſence of the party accuſed, upon any caſe put, or matter ſhewed by them, privately preoccupate the opinion of the Judges: and upon ſo juſt a reſolution the caſe ſucceeded well, for the Peers found the Lord Dacres not guilty.

Mag. Cart. ca. 29.

14. A Noble man cannot waive his triall by his Peers, and put himſelfe upon the triall of the Country, that is, of twelve Freeholders: for the ſtatute of Magna Carta is, that he muſt be tried per Pares. And ſo it was reſolved in the Lord Dacres caſe, Ubi ſupra.

* Reſolved by all the Judges. Mich. 13 & 14 El. in the caſe of Tho. Duke of Norff. 1 H.4.fo.1. 10 E.4.6.b. 13 H.8.fo.12. Tr. 26 H.8. Spilmans Report.

15. * The Peers ought to continue together (as Juries in caſe of other Subjects ought to do) untill they be agreed of their Verdict: & when they are agreed, they all come again into the Court, and take their places, and then the Lord High Steward publickly in open Court, beginning with the puiſne Lord, (who in the caſe of the Lord Dacre was the Lord Mordant,) ſaid unto him: Sy Lord Mordant, Is William Lord Dacre guilty of the treaſons, whereof he hath been indicted or arraigned, or of any of them? And the Lord ſtanding up ſaid, Not guilty: and ſo upward of all the other Lords ſeriatim: who all gave the ſame Verdict: In which caſe the entry is, Super quo W. Comes E. & cæteri antedicti Pares inſtanter ſuper fidelitatibus & ligeantiis dicto Domino Regi debitis, per præfatum Seneſcallum ab inferiori Pare uſq; ad ſupremum ſeparatim publice examinati dicunt, quòd W. Dominus Dacre non eſt culp. &c.

16. The Peers give their Verdict in the abſence of the priſoner, and then is the priſoner brought to the Bar again: and then doth the Lord Steward acquaint the priſoner with the verdict of his Peers, and give judgement accordingly, either of condemnation or acquitall. But it is not ſo in the caſe of another ſubject: for there the verdict is given in his preſence.

Rot. Roman. 17 E.2.m.6. Adam Orleton B. of Hereford. 2 H.4. Marks B. of Carliſle. Stanf. Pl. Coron. li.3.ca.62.fo.153. in Temps H.8.

17. Every Lord of Parliament, and that hath voice in Parliament, and called thereunto by the Kings Writ, ſhall not be tried by his Peers, but only ſuch as ſit there Ratione Nobilitatis, as Dukes, Marquiſſes, Countes, Viſcounts or Barons, and not ſuch as are Lords of Parliament, ratione Baroniarum, quas tenent in jure Eccleſiæ, by reaſon of their Baronies which they hold in the right of the Church, as Arch-Biſhops, and Biſhops, and in time paſt ſome Abbots and Priors, but they ſhall be tried by the countrey, that is, by Free-holders, for that they are not of the degree of Nobility.

a 10 E.4.6.b. Mag. Cart. c.29.

18. *a* No Noble man ſhall be tried by his Peers, but only at the ſuit of the King upon an indictment of high treaſon, or miſpriſion of the ſame, petit treaſon, murder, or other felony, or miſpriſion of the ſame. But in caſe of a Præmunire or the like, though it be at the ſuit of the King, he ſhall not be tried by his Peers, but by Freeholders. And ſo in an Appeale at the ſuit of the party for petit treaſon, murder, robbery, or other felony, he ſhall be tryed by Freeholders. See more hereof in the ſecond part of the Inſtitutes, Magna Carta, cap. 29.

b 11 E.3.bre. 473. 8 R.2.proces. pl. ultimo. 20 E.4.6. 20 El. Dier 360. 38 H.8.Br. treaſon. Seignior Sancars caſe. Lib.9.fo.117.

19. *b* And albeit a man be Noble, and yet no Lord of the Parliament of this Realm, (as if he be a Nobleman of Scotland, or of Ireland, of France, &c.) he ſhall be tried by Knights, Eſquires, or others of the Commons. And ſo it is of the ſonne of a Duke, Marquiſſe, Earle, &c. he is Noble, and called Lord: and yet becauſe he is no Lord of Parliament, he ſhall be tried as one under the degree of a Peer, and Lord of Parliament.

20. No Peer of the Realme, or any other ſubject ſhall be convicted by Verdict, but the ſaid offences muſt be found by above Four & twenty, viz. by twelve, or above, at his indictment, or by twelve Peers, or above, if he be Noble, and by twelve

twelve, and not above, if he be under the degree of Nobility.

21. A Peer of the Realme being indicted of treaſon, or felony, or of miſpriſion, as is aforeſaid, and duly tranſmitted to the Lords, may be arraigned thereof in the upper Houſe of Parliament, as frequently in Parliament Rolls it doth appeare: but then there muſt be appointed a Steward of England, who ſhall put him to anſwer: and if he plead not guilty, he ſhall be tried per Pares ſuos, and then the Lords Spirituall muſt withdraw, and make their proxies: but no Appeal of treaſon can be in Parliament, [a] but is ouſted by the ſtatute of 1 H.4. cap. 14.

22. [b] And as the beginning (viz. the finding of the indictment by Freeholders) is equall to them both: ſo the moſt extreme and heavie judgement, if they be found guilty, is equall to both, &c. which you may reade in the firſt part of the Inſtitutes, Sect. 147.

23. [c] And though the Commiſſion of the Lord Steward be only in theſe latter times hac vice, yet may the ſame be adjourned, as other Commiſſions hac vice may. And ſo it was holden in the Lord Dacres caſe. And ſo it was done by the Steward of England in the caſe of R. Earle of S. and of F. his wife, who adjourned his Commiſſion untill the next day.

24. If execution be not done according to the judgement, then the High Steward in the caſe of a Peer of the Realm, or the Court or Commiſſioners in caſe of another ſubject, may by their precepts under their ſeales command execution to be done according to the judgement: but in caſe of High Treaſon, if all the reſt of the judgement (ſaving the beheading, which is part of the judgement) be pardoned, this ought to be under the Great Seale of England.

25. And when the ſervice is performed, then is an Oyes made for the diſſolving of the Commiſſion; and then is the White Rod, which hath been borne and holden before the Steward, by him taken in both his hands, and broken over his head.

Laſtly, the Indictments together with the Record of the arraignment, triall, and judgement, ſhall be delivered into the Kings Bench, there to be kept and inrolled.

Hitherto we have ſpoken when a Noble man doth appear, and plead not guilty, and put himſelf upon his Peers: Now let us ſee what ſhall be had againſt him when he is indicted, and appears not, and cannot be taken: and generally he ſhall be outlawed, per judicium Coronatorum. But how doth that ſtand with Magna Charta, Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum? That is to be intended, when he appears and pleads not guilty, and puts himſelf upon his Peers: but when he abſents himſelf, and will not yeild himſelf to the due tryall of his Peers, then he ſhall be outlawed per judicium Coronatorum, or elſe he ſhould take advantage of his own contumacy, and flying from judgement. [d] For proces to be awarded upon the indictment or appeal of treaſon, felony or treſpas, either againſt a Nobleman or any other, ſee the ſtatute of 6 H.6. and 8 H.6. and if the proces & order preſcribed by thoſe ſtatutes be not purſued, the outlawry may be reverſed by writ of error, which writ ought to be granted to him ex merito Juſtitiæ, as it was adjudged in Ninian Menvils caſe: and thoſe ſtatutes doe extend as well to the Kings Bench, as to other courts having by commiſſion power to hear and determine the ſame, and very few outlawries of treaſon or felony, are of force and validity in law, for that theſe Acts are not purſued.

And theſe Acts are well expounded by our * books, and therefore they ſhall not need to be recited at large. This is neceſſary to be added, that the opinion of Stanf. Pl. Cor. 182. I. upon the ſtatute of 33 H.8. c. 20. is, where the attainder is not erroneous, but lawfull by the courſe of the law: and ſo it was reſolved, Tr. 28 Eliz. and thereupon [e] the ſtatute of 28 Eliz. ca. 2. was made, that no attainder that then was for any High Treaſon ſhould be reverſed for error where the party was executed. But that Act extendeth only to attainders before that Act, and where the party attainted ſuffered pains of death, as hath been ſaid.

10 E.4.6. Rot. Par. 21 R.2. Countee de Arundels caſe. Rot. Parliam. 5 H.4.nu.11,12. 31 H.6.nu.49. Countee de Devons caſe. 28 H.6.nu.19. Duke of Suff.

a 1 H.4.cap.14.

b 1 H.4.1. Stanf. Pl.Coron. 182.E.K.

See hereafter cap. judgement and execution.

c Paſch. 26 H. 8. ubi ſupra. 5 E.4.33. 12 H.4.20.

Mag. Cart. ca. 29.

d See hereafter in the chapter of judgement & execution concerning reverſing of Outlawries. 6 H.6.c.1. 8 H.6.ca.10. Mich. 26 & 27 Eliz. in bre de error coram Rege in Ninian Menvills caſe. Utlary de haut treaſon reverſe in Bank le Roy.

* 19 H.6. fo.1.2. 11 H.6.54. 1 E.4.1. 30 H.6. proces. 192. 31 H.6.11. Vide F.N.B. 115.I. Li.Intr.R.f.122. Stanf. Pl.cor.63. 69. 182.I.

e 28 El.ca.2.

But admitting the proces be awarded according to theſe ſtatutes, & the truth is, that the party indicted of High Treaſon (be he noble or other) at the time of the outlawry pronounced, is out of the realm, &c. whether may he avoid the ſame by writ of error? The anſwer is, that he might have avoided the ſame by writ of error at the common law: but now in caſe of High Treaſon he is barred of his writ of error by the ſtatutes of 26 H. 8. and 5 E. 6. which ſtatutes are expounded to extend generally to all treaſons, but thoſe ſtatutes extend not to any other offence then high treaſon only, and therefore all other offences remain as they did at the common law for that point.

See the firſt part of the Inſti. Sect. 26 H. 8. cap. 13. 5 E. 6. cap. 11. 12 El. Dier 287.

Now for that all indictments for any offence whatſoever, as well of Noblemen, as of any under the degree of Nobility, ought by the common law of the Realm to be by perſons duly returned, and by * lawfull liege people, indifferent as they ſtand unſworn, and without any denomination of any: a good and profitable law * was made in that behalf at the Parliament holden in 11 H. 4. in theſe words. Item becauſe that now of late [a] Inqueſts were taken at Weſtm' of perſons named to the [b] Juſtices, without due return of the Sherif, of which perſons ſome were [c] outlawed before the ſaid Juſtices of record, and ſome fled to Sanctuary for treaſon, and ſome for felony, there to have refuge; by whom as well many offenders were indicted, as other lawfull liege people of our Lord the King, not guilty by conſpiracy, abetment, and falſe imagination of other perſons for their ſpeciall advantage and ſingular lucre, againſt the courſe of the common law uſed and accuſtomed before this time. Our ſaid Lord the King for the greater eaſe and quietneſſe of his people, will and granteth, that the ſame indictment ſo made, with all the dependance thereof be [d] revoked, adnulled, void, and holden for none for ever. And that from henceforth no indictment be made by any ſuch perſons, but by enqueſts of the Kings lawfull [e] liege people, in the manner, as was uſed in the time of his Noble Progenitors, returned by the Sherifs, or baylifs of franchiſes, without any [f] denomination to the Sherifs, or baylifs of franchiſes before made by any perſon of the names, which by him ſhould be impanelled, except it be by the officers of the ſaid Sherifs or baylifs of franchiſes ſworn and known to make the ſame, [g] and other officers to whom it pertaineth to make the ſame according to the law of England. And if any indictment be made hereafter in any point to the contrary, that the ſame indictment be alſo void, revoked, and for ever holden for none.

* Artic. ſup. cart. cap. 9. 28 E. 1. 20 E. 3. cap. 6. 34 E. 3. c. 4. 42 E. 3 c. 11. Regiſt. 178. Raſt. pl. 117.
[a] 11 H. 4. ca. 9.
[a] Stanf. pl. cor. 87. c.
[b] Rot. Parl. 11, H. 4. nu. 15. in the kings bench.
[c] Vid. 11 H. 4. fo. 41. 21 H. 6. 30. 9 E. 4. 16. 3 H. 6. 55. 26 Aſſ. 28.
[d] 11 H. 4. 41.
[e] 14 H. 4. 19.
[f] 21 E. 3. 5. 15 E. 3. chal. 113. 27 Aſſ. pa. 65. 28 Aſſ. 24. 32. 49 E. 3. 1. 49 Aſſ. 1. 28. 43 E. 3. chall. 94. 6 R. 2. chall. 102. 7 H. 4 10. 21 E. 4. 74. 19 H. 6. 9. 21 H. 6. 22. 14 H. 7. 14.
[g] Nota.

The body of this Act conſiſteth upon two diſtinct Purviens or Branches, the one to remedy a miſchief paſt, the other to provide for the time to come. The firſt branch conſiſteth of a preamble, and a purvien: and the preamble containeth theſe eight parts. Firſt, it ſheweth divers inqueſts had been taken at Weſtminſter by perſons named to the Juſtices. Secondly, without due return of the Sherif. Thirdly, of which ſome were outlawed before the ſaid Juſtices of record. Fourthly, ſome fled to Sanctuary for treaſon, and ſome for felony. Fifthly, by whom many offenders were indicted. Sixthly, ſome not guilty. Seventhly, by conſpiracy, &c. Eightly, that all this was againſt the courſe of the common law. By the body of the Act, it is enacted that the ſame indictment, with all the dependance thereof, be revoked, and made void. Then followeth the ſecond branch or purvien for the time to come, and this purvien conſiſteth of divers parts: Firſt, in deſcribing by what perſons indictments ought to be found, and therein 1. privativè, that is, not by any ſuch perſons, having reference to the preamble, which perſons we have before particularly diſtinguiſhed. 2. Poſitivè, that all indictments muſt be found by perſons of theſe qualities. 1. They muſt be the Kings lawfull liege people. 2. Returned by Sheriffs, or baylifs of franchiſes, and other officers to whom it pertaineth. 3. Without any denomination to the Sheriffs, baylifs, or other officers: and this purvien is in affirmance, and declaratory of the Common law.

The ſecond part of the purvien is introductory of a new law, viz. that if any Indictment be made hereafter in any point to the contrary, that the ſame indictment be void, revoked, and holden for none. Wherein theſe two things are to be

be obſerved: 1. That this is a generall law, and extendeth to all indictments for any crime, default, or offence whatſoever: for the words be [if any indictment] generally without naming of any Court, or before whom. 2. If the indictment be found by any perſons that are outlawed, or not the Kings lawfull liege people, or not lawfully returned, or denominated by any, viz. by all are any of theſe, that then the indictment is void, for the words be, [if any indictment be made hereafter in any point to the contrary, &c.] Upon this ſtatute in the caſe of Robert Scarlet before the Juſtices of Aſſiſe at Bury in the County of Suffolk, in Sommer Vacation, 10 Ja.R. theſe points were reſolved and adjudged: Firſt, where at the Seſſions of the Peace holden at Woodbridge in the ſaid County of Suffolk, Robert Scarlet by confederacy between him and the Clerk, that was to read the pannell of the grand Jury returned by the Sherif, (whereof he was none, albeit he laboured the Sherif to have returned him) that the Clerk ſhould read him as one of the pannell, which was done accordingly, & he ſworn. It was reſolved and adjudged that this caſe was within this ſtatute, for that he was not returned by the Sherif. Secondly, that where the reſt of the great inqueſt giving faith to him indicted ſeventeen honeſt and good men upon divers penall ſtatutes, which was done by the ſaid Robert Scarlet maliciouſly: It was reſolved and adjudged, that albeit he * alone was ſworn without the return of the Sherif, and all the reſt duly returned, yet that this caſe was within this ſtatute, and all the indictments found by him and the reſt were void by this ſtatute: for hereby it appeared what miſchief ſuch a one might doe. Thirdly, that Robert Scarlet upon this caſe had offended againſt the ſaid Act, and might be indicted thereupon: and accordingly he was upon ſufficient proof of the fact, as is aforeſaid, indicted upon the ſaid Act, and pleaded not guilty, and was found guilty. Fourthly, that this Act extended not only to indictments of treaſon and felony, but of all other offences and defaults whatſoever, according to the generality of the words. Fifthly, conſideration was had of the Act of 3 H. 8. cap. 12, and reſolved clearly that this ſtatute had not altered the Act of 11 H. 4. in any thing concerning the offence of Scarlet, as upon that, which ſhall be ſaid of the Act of 3 H. 8. ſhall appear. And upon hearing of Councell learned what they could ſay in arreſt of judgement, at laſt judgement was given, that he ſhould be fined and impriſoned, and ordered by the Court that no proces ſhould goe out upon the ſaid indictments found by the ſaid great inqueſt, whereof Scarlet was one.

* 47 E. 3. 1.
7 H. 4. 10.
21 E. 4. 74.

3 H. 8. c. 12.

But notwithſtanding this good law, through the ſubtilty, & untrue demeanor of Sherifs, and their Miniſters, great extortions and oppreſſions be and have been committed and done to many of the Kings ſubjects by means of returning at Seſſions holden within counties and ſhires for the body of the ſhire, the names of ſuch perſons as for the ſingular advantage, &c. of the ſaid Sherifs and their Miniſters, will be wilfully forſworn and perjured by the ſiniſter labour of the ſaid Sherifs and their Miniſters, by reaſon whereof many ſubſtantiall perſons, the Kings true ſubjects have been wrongfully indicted of murders, felonies, and miſdemeanours: and ſometime by labour of the ſaid Sherifs and their Miniſters, divers great felonies and murders have been concealed, &c. For remedy of which miſchiefs it is enacted by the ſaid ſtatute of 3 H. 8. cap. 12. That the Juſtices of Gaol Delivery, or Juſtices of Peace, whereof one to be of the Quorum, in their open Seſſions may reform the panell returned by the Sherif to inquire for the King, by putting to and taking out the names of the perſons ſo impanelled by the diſcretion of the ſaid Juſtices, &c. and that the Sherif ſhall return the panells ſo reformed. This Act extends only to Juſtices of Gaol Delivery, and of the Peace: The body of the Act for offences is generall and evident. Vide 11 H. 7. cap. 24.

Vid. 11 H. 7. c. 24.

Nota Lector, that the aforeſaid Parliament of 11 H. 4. begun in Quindena Hilarii, Anno 11 H. 4. and the ſame tearm, viz. Hil. 11 H. 4. fo. 41. it was according to the ſaid Act of 11 H. 4. reſolved by Gaſcoign Chief Juſtice, and all the reſt of the Juſtices, that an indictment of felony found by an inqueſt before 5 H. 4. whereof one was outlawed of felony, and another was acquited by the generall

Hil. 11 H. 4. f. 41.

generall pardon, ſo as they were not probi et legales homines to enquire as the law willeth, and after the party had pleaded not guilty to the felony, it was awarded, that all the indictments by them found, were adnulled and made void. Herewith agreeth Stanford in his Pleas of the Crown, fo. 87. & 88. Vide F. tit. Indictment 25. & Coron. 89. and Brook tit. indictment. 2. Note the Act ſaith, that they were outlawed before themſelves, ſo as the Court may take knowledge thereof of themſelves, or of any other, as amicus curiæ: but the ſafeſt way for the party indicted is to plead, upon his arraignment, the ſpeciall matter given unto him by the ſtatute of 11 H. 4. for the overthrow of the indictment, with ſuch averments, as by law are required, (agreeable to the opinion of the Lord Brook. Ubi ſupra.) and to plead over to the felony, and to require councell learned for the pleading thereof, which ought to be granted, and alſo to require a copy of ſo much of the indictment, as ſhall be neceſſary for the framing of his plea, which alſo ought to be granted. And theſe Laws made for indifferency of Indicters, ought to be conſtrued favourably, for that the indictment is commonly found in the abſence of the party, and yet it is the foundation of all the reſt of the proceeding.

Stanf. Pl. cor. 87, 88. F. tit. Indictment 25. & Coron. 89. Br. tit. indict. 2.

Vid. Ieſtatutes de 1 R 3. ca. 4. 33 H 6. c. 2. W. 2. ca. 13. 1 E. 3. ſtat. 2. ca. 17. All tending that indictments may be duly had.

To draw to an end concerning Tryals: It is regularly true, that by the Common law the tryall ſhall be in the County, where the indictment is taken: and by the aforeſaid Act of 35 H. 8. treaſons and miſpriſions of treaſons committed or done out of the Realm, &c. ſhall be enquired of, heard, and determined before the Juſtices of the Kings Bench, &c. Now the caſe fel out upon this ſtatute to be thus: * One was indicted before the Juſtices of the Kings Bench, at the Tearm holden at Hertford, by a Jury of the County of Hertford, for divers high treaſons committed out of this Realm, and after the tearm was adjourned to Weſtm. in the County of Midd. The queſtion was, by which of the Counties the party indicted ſhould be tried: And it was reſolved, that he ſhould be tried by men of that County where the indictment was taken. But otherwiſe it is upon the ſtatute of 5 El. ca. 1. the caſe being, that Horn Biſhop of Winch. tendred to Edmond Bonner late Biſhop of London, in the County of Surrey, within his Dioces the oath of Supremacy according to the Act of 1 Eliz. which Bonner refuſed, and this was certified by the Biſhop of Winch. into the Kings Bench, then ſitting at Weſtminſter in the County of Midd. Now by the ſtatute of 5 El. he that refuſeth the oath is to be indicted of a Premunire by a Jury of Midd. as a Jury of that County might doe for any offence done in that County, and extendeth only to the indictment, where the words of the Act of 35 H. 8. be, [ſhal be enquired of, heard, and determined,] the queſtion upon the ſtatute of 5 Eliz. was, if Bonner ſhould appear and plead not guilty, by what County he ſhould be tried, whether by a Jury of Midd. where the indictment was, or by a Jury of Surrey, where the offence was committed; and reſolved that he ſhould be tried by a Jury of Surrey: for the the ſtatute of 5 El. extendeth to the indictment only, and leaveth the triall to the Common law, which appointeth the tryall to be, where the offence is committed, and ſo a manifeſt diverſity between the two caſes: for regularly by the Common Law in all Pleas of the Crown, Debet quis juri ſubjacere, ubi deliquit.

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All tending that indictments may be duly had. Dier 3 Mar. 131, 132. Stanf. pl. cor. 90. 35 H. 8. ca. 2.

* Mich. 35 & 36 El. in the caſe of Francis Dacres.

5 El. cap. 1.

Mich. 6 & 7 El. Dier fo. 234. Bonners caſe.

It is now neceſſary to be known, how Priſoners (to ſpeak once for all) committed for treaſon, or any other offence ought to be demeaned in priſon. Bracton ſaith, Solent præſides in carcere continendos damnare, ut in vinculis contineantur, ſed hujuſmodi interdicta ſunt à lege, quia carcer ad continendos, non ad puniendos haberi debeat: And in another place he ſaith, Cum autem taliter captus coram Juſtic. eſt producendus, produci non debet ligatis manibus, (quamvis interdum geſtans compedes propter evaſionis periculum,) et hoc ideo, ne videatur coactus ad aliquam purgationem ſuſcipiendam.

Bract. lib. 3. fo. 154. b. *Vincula qui ſenſit, didicit ſuccurrere vinctis.* Bract. lib. 3. fo. 105. a. Stanford 78. Bract. li. 3. f. 137. Note Shackells about the feet ought not to be, but for fear of eſcape. Mirror c. 2. §. 9.

[a] If felons come in judgement to anſwer, &c. they ſhall be out of Irons, and all manner of bonds, ſo that their pain ſhall not take away any manner of reaſon, nor them conſtrain to anſwer, but at their free will. [b] And in another place he ſaith, and of priſoners we will that none ſhall be put in Irons, but thoſe which

[a] Brit. c. 5. fo. 14. [b] Cap. 11. fo. 17.

which shall be taken for felony, or trespas in Parks or Vivaries, or which be found in averages upon account, and we defend that otherwise they shall not be punished nor tormented. c Omnes autem attachiabiles licet vicecomiti in prisona custodire, &c. non tamen ad puniend', sed ad custodiend', &c. d It is an abuse that prisoners be charged with Irons, or put to any pain before they be attainted.

W.2.c.1. after judgement. Lib.3.fo.44. Lib.8.fo.100. 24 H.8.Dier 249. Pl. Com.360.a.

c Fleta li.1,ca.26. d Mirror c.5.§.1. e 8 E.2.cor.432. f Tr. 7 E.3. coram rege Rot.44.

c Quidam sacerdos arraniatus de felonia posuit se super patriam, & stetit ad barram in ferris, sed per præceptum Justic. liberatur à ferris. And there is no difference in law, as to a Priest and a Lay man, as to Irons.

f Presentat quod ubi quidam Robertus Bayhous de Tanesby captus fuit, & in prisona castri Lincoln detentus pro quodam debito Statut. mercatorii in custodia Tho. Boteler Constabularii castri de Lincoln ibi præd. Tho. le Botelet posuit ipsum Robertum in profundo Gaole inter lenones in vili prisona contra * formam Statut. &c. & eodem profundo detinuit, quousque idem Robertus fecit finem cum eo de 40 s. quos ei solvit per extorsionem.

* 1 E.3.c.7.

So as hereby it appeareth, that where the law requireth that a prisoner should be kept in salva & arcta custodia, yet that that must be without pain or torment to the prisoner.

Hereupon two questions do arise, when and by whom the Rack or Brake in the Tower was brought in.

Tortures, the rack, &c.

To the first, John Holland Earle of Huntingdon, was by King H. 6. created Duke of Exeter, and Anno 26 H. 6. the King granted to him the office of the Constableship of the Tower: He and William De la Poole Duke of Suffolk, and others, intended to have brought in the Civill Lawes. For a beginning whereof, the Duke of Exeter being Constable of the Tower first brought into the Tower the Rack or Brake allowed in many cases by the Civill Law; and thereupon the Rack is called the Duke of Exeters Daughter, because he first brought it thither.

Rot. Pat. 26 H 6. Rot. Parl. 28 H.6.nu.30. Hollenshed. pa.670.&c. Innocentem cogit mentiri dolor. Fortescue.ca.22. fo.24.

To the second upon this occasion, Sir John Fortescue Chiefe Justice of England, wrote his Book in commendation of the lawes of England, and therein preferreth the same for the government of this countrey before the Civill Law; and particularly that all tortures and torments of parties accused were directly against the Common Lawes of England, and sheweth the inconvenience thereof by fearfull example, to whom I refer you being worthy your reading. So as there is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in.

And the Poet in describing the iniquity of Radamanthus, that cruell Judge of Hell, saith,

Castigatque, auditque dolos, subigitque fateri.

Virgil.

First, he punished before he heard, and when he had heard his deniall, he compelled the party accused by torture to confesse it. But far otherwise doth Almighty God proceed postquã reus diffamatus est. 1. Vocat. 2. Interrogat. 3. Judicat. To conclude this point, it is against Magna Carta, cap. 29. Nullus liber homo, &c. aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ. And accordingly all the said ancient Authors are against any paine, or torment to be put or inflicted upon the prisoner before attainder, nor after attainder, but according to the judgement. And there is no one opinion in our Books, or judiciall Record (that we have seen and remember) for the maintenance of tortures or torments, &c.

Luke 16.1,2.&c. John 7.51. Nunquid lex nostra judicat hominem nisi prius audierit ab ipso?

And now, to conclude this Chapter of Treason. It appeareth in the holy Scripture, that traytors never prospered, what good soever they pretended, but were most severely and exemplarily punished: As a Corah, Dathan and Abiram, by miracle: Dirupta est terra sub pedibus eorum, & aperiens os suum devoravit illos, &c. b Athalia the daughter of Amri, interfecta est gladio. c Bagatha and Thara against Assuerus, Appensus est uterq; eorum in patibula. d Absolon against David. Suspensus in arbore, & Joab infixit tres Lanceas in corde ejus. e Achitophel with Absolon against David. Suspendio interiit, he hanged himselfe.

Proditor illudit verbis, dum verbera cudit.

a Numb.16.31, 32. & 27 3. b 2 Regum 11.16. c Esth.12.2,3. d 2 Sam.18.9. 14. e 2 Sam.17.23.

himſelfe. f Abiathar the tratterous High Prieſt againſt Solomon. Abiathar Sacerdoti dixit Rex, &c. Et quidem vir mortis es, ſed hodiè te non interficiam, &c. Ejecit ergo Solomon Abiathar, ut non eſſet Sacerdos. g Shimei againſt David, gladio interfectus. h Zimri againſt Ela, who burnt himſelfe. i Theudas (qui occiſus eſt, & circiter 400 qui credebant ei, diſperſi ſunt & redacti ad nihilum) and Judas Galilæus, ipſe periit, & omnes quotquot conſenſerunt ei, diſperſi ſunt. Laſtly, k Judas Iſcariot, ſecundum nomen ejus vir occiſionis, the traytor of traytors. Et hic quidem poſſedit agrum de mercede iniquitatis ſuæ, & ſuſpenſus crepuit medius, & diffuſa ſunt omnia viſcera ejus.

f 1 Reg. 2. 26, 27.

g 2 Sam. 16. 5, 6. 1 Reg. 2. 8. &c. 46.

h 1 Regum 16. 9. &c. 18.

i Act. Apoſt. 5. 36, 37.

k Act. Apoſt. 1. 18. Math. 27. 5. laqueo ſe ſuſpendit *Qui molitur inſidias in patriam, id facit quod inſanus nauta perforans navem in qua ipſe vehitur.* * *Felix quem faciunt aliena pericula cautum.* Prov. 24. 21.

Peruſe over all our Books, Records, and Hiſtories, and you ſhall finde a principle in law, a rule in reaſon, and a trial in experience, That treaſon doth ever produce fatall & finall deſtruction to the offender, and never attaineth to the deſired end, (two incidents inſeparable thereunto.)* And therfore let all men abandon it, as the moſt poiſonous bait of the Devill of hell, and follow the precept in holy Scripture, Feare God, honour the King, and have no company with the Seditious.

See more of Treaſon in the nert Chapter of Miſpriſion, &c. and in Principall and Acceſſory, in the title of Judgement and Execution: and in the Chapter of Monomachia, ſingle combate, &c. the reſidus of this Act of 25 E. 3.

CAP. III.

Of Miſpriſion of Treaſon.

Miſpriſio prodicionis.

See Bract. lib. 3. fo. 118. b. & 119. a.

MIſpriſio commeth of the French word Meſpris, which properly ſignifieth neglect or contempt: for [mes] in compoſition in the French ſignifieth mal, as mis doth in the Engliſh tongue: as miſchance, for an ill-chance, and ſo meſpriſe is ill apprehended or known. In legall underſtanding it ſignifieth, when one knoweth of any treaſon or felony, and concealeth it, this is miſpriſion, ſo called, becauſe the knowledge of it is an ill knowledge to him, in reſpect of the ſevere puniſhment for not revealing of it: For in caſe of miſpriſion of High Treaſon he is to be impriſoned during his life, to forfeit all his goods, debts, and duties for ever, and the profits of his lands during his life: and in caſe of felony, to be fined and impriſoned. And in this ſenſe doth the ſaid ſtatute of 1 & 2 Ph. & Mar. ſpeak, when it ſaith, Be it declared, and enacted, by the Authority aforeſaid, that concealement or keeping ſecret of any High Treaſon be deemed and taken only miſpriſion of treaſon, and the offenders therein to forfeit and ſuffer, as in caſes of miſpriſion of treaſon hath heretofore been uſed. * But by the Common law concealement of High Treaſon was treaſon, as it appeareth in the caſe of the Lord Scrope, An. 3 H. 5. and by Bracton, lib. 3. fo. 118. b. & 119 a.

See hereafter ca. 65. of miſpriſions, &c.
See hereafter in Theftbot. ca. 61. 1 & 2 Ph. & Mar. ubi ſupra.
See 1 E. 6. c. 12. and 1 El. ca. 6. 25 H. 8. ca. 12.
* Hil. 14 El. cited by the Lo. Dier in the Lo. Lumleys caſe. MS.

a It is miſpriſion of High Treaſon, for forging of money, which neither is the money of this Realme of England, nor currant within the ſame.

a 14 El. ca. 3.

b Miſpriſion of High Treaſon in concealing of a Bull, &c. See the ſtatute.

b 13 El. ca. 2.

c It is ſaid in 2 R. 3. that every treaſon or felony includeth in it a miſpriſion of treaſon or felony. Therefore if any man knoweth of any High Treaſon, he ought with as much ſpeed as conveniently he may to reveale the ſame to the King, or ſome of his Privie Councell, or any other Magiſtrate. And miſpriſion in a large ſenſe is taken for many great offences which are neither treaſon nor felony, whereof we ſhall ſpeak more hereafter, being in this place reſtrained to miſpriſion of treaſon.

c 2 R. 3. fo. 9. Stanf. 57. c.

See John Coniers Caſe Dier 296. That the receiving of one that hath counterfeited the Kings Coine, and comforting of him knowing him to have counterfeited the Kings coine, is but miſpriſion.

See more of miſpriſion of treaſon in the Chapters of High Treaſon, and of Principall and Acceſſory.

CAP.

CAP. IV.

Felony by compaſsing or conſpiring to kill the King, or any Lord or other, of the Kings Counſell.

NErt hereunto we have thought good to ſpeak of the Statute of 3 H. 7. the letter of which law enſueth. 3 H. 7. cap. 14.

Item, FOraſmuch as by quarrels made to ſuch as have been in great authority, office, and of counſell with Kings of this Realme, hath enſued the deſtruction of Kings, and the undoing of this Realme; ſo as it hath appeared evidently, when compaſſing of the death of ſuch as were of the Kings true ſubjects was had, the deſtruction of the Prince was imagined thereby: and for the moſt part it hath growne, and been occaſioned by envie, and malice of the Kings own houſhold-ſervants; as now of late ſuch a thing was likely to have enſued: * And for ſo much as by the law of this land, if actuall deeds be not had, there is no remedy for ſuch falſe compaſſings, imaginations, and confederacies had againſt any Lord, or any of the Kings Counſell, or any of the Kings great Officers in his Houſhold, as Steward, Treaſurer, & Comptroller: and ſo great inconveniencies might enſue, if ſuch ungodly demeaning ſhould not be ſtraitly puniſhed before that actuall deed were done. Therefore it is ordained by the King, the Lords Spirituall and Temporall, and the Commons of the ſaid Parliament aſſembled, and by authority of the ſame, That from hence forward, the Steward, Treaſurer, and Comptroller of the Kings houſe for the time being, or one of them, have full authority and power to enquire by Twelve ſad men, and diſcreet perſons of the Chequer Roll of the Kings honourable houſhold, if any ſervant admitted to be his ſervant ſworne, and his name put into the Chequer Roll of his houſhold, whatſoever he be, ſerving in any manner, office, or roome, reputed, had and taken, under the ſtate of a Lord, make any confederacies, compaſſings, conſpiracies, or imaginations with any perſon or perſons, to deſtroy or murder the King, or any Lord of this Realme, or any other perſon ſworne to the Kings Counſell, Steward, Treaſurer, or Comptroller of the Kings houſe; that if it be found before the ſaid Steward for the time being, by the ſaid twelve ſad men, that any ſuch of the Kings ſervants as is aboveſaid, hath confederated, compaſſed, conſpired, or imagined, as is aboveſaid, that he ſo found by that Inquiry, be put thereupon to anſwer. And the Steward, Treaſurer, and Comptroller, or two of them have power to determine the ſame matter according to the Law. And if he put him in triall, that then it be tried by other twelve ſad men of the ſame houſhold: and that ſuch miſdoers have no challenge, but for malice. And if ſuch miſdoers be found guilty by confeſſion, or otherwiſe, that the ſaid offence be judged felony, and they to have judgement and execution as felons attainted ought to have by the Common Law. * Nota.

This Act divideth it ſelf into Two generall parts, viz. the Preamble, And the body of the Act. In the preamble Three things are to be obſerved.

1. That by quarrels made to ſuch, as are in great Authority, office, and of Counſell with the Kings of the Realm, have enſued the deſtruction of the Kings, and the undoing of the Realm, as in the Records of Parliament, and Hiſtories of King E. 2. R. 2. King H. 6. &c. you may read. And as King William Rufus was ſlain in the new Foreſt by the glance of an arrow, ſo the overthrow of the King, &c. hath followed by glances, and conſequents, when the bow of deſtruction hath been aimed at the overthrow of thoſe, who were in great Authority neer about, and dear to the King, not daring in direct manner to aim at the King himſelf. Therefore, the firſt concluſion is, that when the compaſſing of the death of ſuch, as were of the Kings true ſubjects was had, the deſtruction of the Prince was imagined thereby.

2. That for the moſt part, it hath grown by envy and malice by the Kings own houſhold ſervants: and the reaſon thereof is, for that they being of the Kings houſhold, have greater and readier means either by night, or by day to deſtroy ſuch as be of great Authority, and neer about the King: and ſuch an attempt and conſpiracy was before this Parliament made by ſome of this Kings houſhold ſervants, and great miſchief was like thereupon to have enſued, which was the cauſe of the making of this Act.

See before in the chapt. of High treaſon. Verb. Overt Act.

3. The concluſion of the Preamble is, that by the law of the land, if actuall deeds be not had, there is no remedy for ſuch falſe compaſſings, &c. This is a true declaration: For the bare conſpiracy of the death of any Lord or other of the Kings Councell, or of the Steward, Treaſurer, or Comptroller, unleſſe they had been ſlain indeed, was no felony before this Act, and ſo reſolved upon the contempt and conſpiracy aforeſaid.

In the body of this Act, Six things are enacted. Firſt, that the offender muſt have three qualities. 1. He muſt be the Kings ſervant ſworn. 2. His name muſt be put in the Cheque Roll of the Kings houſhold. 3. He muſt be under the ſtate of a Lord: and if he conſpire with any other, that is not of the Kings houſhold, yet is the conſpiracy within this Act, but he of the Kings houſhold is only the felon within the purview of this ſtatute, as it appeareth by the words of the ſtatute.

Secondly, Againſt what perſons the offence made felony by this Act is to be committed: and in number they be Four. 1. To deſtroy or murder the King. By this Act it expreſſly appeareth by the judgement of the whole Parliament, that beſides the confederacy, compaſſing, conſpiracy, or imagination, there muſt be ſome other overt act or deed tending thereunto, to make it treaſon within the ſtatute of 25 E. 3. And therefore the bare confederacy, compaſſing, conſpiracy, or imaginations by words only, is made felony by this Act. But if the Conſpirators doe provide any weapon, or other thing, to accompliſh their devilish intent, this and the like is an overt act to make it treaſon. 2. Any Lord of this Realme being ſworn of the Kings Councell: for by the Purview of this Act, he muſt be alſo of the Kings Councell: this is underſtood of the Kings Privy Councell, and ſo throughout the Act. 3. Any other of the Kings Councell (that is, the Kings Privy Councell) being under the degree of a Lord. 4. The Steward, Treaſurer, and Comptroller of the Kings houſhold, being great officers, though they be not of the Kings Councell.

See before in the chapt. of High treaſon. ubi ſup.

Thirdly, The third generall part expreſſeth the perſons to whom power is given to enquire & determine this felony. The Steward, Treaſurer, and Comptroller, or any one of them may enquire. And they or two of them have power by this Act to hear and determine the ſame: and though the words be for the Inquiry, that they three, or any of them, &c. yet an Indictment taken before two of them is good, becauſe it is for advancement of Juſtice. And this Act is in nature of a Commiſſion to them, for other Commiſſion they need not to have: and this you may ſee in divers other Acts of Parliament of like nature. If any the houſhold ſervants conſpire the death of the Steward, Treaſurer, and Comptroller, yet by force of this Act they are Judges of the cauſe, and none other can be, and in that caſe, they

18 E. 3. 1.
23 Aſſ. 17.
27 H. 6. 8.
27 H. 8. 13.

they will aſſiſt themſelves for their direction, with ſome grave and learned men in the laws. But if the death of any one of them be compaſſed, then it is more convenient that it be heard and determined before the other two.

Fourthly, the fourth part ſetteth forth, firſt, how the Inquiry, after the triall ſhall be made, that is, that the Inquiry muſt be made by twelve ſad men and diſcreet perſons of the Cheque Roll of the Kings houſhold: and when the offender hath pleaded not guilty, the tryall ſhall be by the like perſons. And here though this Act limiteth the inquiry to be by twelve, yet if it be Inquired of by more then twelve, the preſentment is good, but the tryall muſt be by twelve only.

Fifthly, no challenge ſhall be made, but for malice.

Sixthly, by the contexte of the whole Act, the conſpiracy, that is to be heard and determined by this Act, muſt be plotted to be done within the Kings houſhold. Vide lib. Plac. Coke fo. 482.

The offender againſt this ſtatute ſhall have the benefit of his Clergy: for whenſoever Felony is made by any ſtatute, and the benefit of Clergy is not expreſſly taken away, the offender ſhall have his Clergy.

See the ſtatute of 3 & 4 E. 6. whereby amongſt other things in ſome caſe it was High treaſon, and in ſome caſe felony, to intend, or goe about to kill, or impriſon any of the Kings Privy Councell, &c. from which felony, the benefit of Sanctuary, and Clergy was taken away: but theſe treaſons and felonies are repealed by the ſtatute of 1 Mar. 3 & 4 E. 6. ca. 5.

CAP. V.

Of Hereſie.

COncerning Hereſie five things fall into conſideration. Firſt, who be the Judges of Hereſie. Secondly, what ſhall be adjudged Hereſie. Thirdly, what is the judgement upon a man convicted of Hereſie. Fourthly, what the law alloweth him to ſave his life. Fifthly, what he ſhall forfeit by judgement againſt him.

Touching the Firſt, an Heretique may be convicted [a] before the Archbiſhop and other Biſhops, and other the Clergy at a generall Synod, or Convocation, as it appeareth both by our books, and by hiſtory. See the ſtatute of 25 H. 8. cap. 19. revived by 1 El. cap. 1.

[a] Bract. l. 3. fo. 123. & 124. in Conc' Oxon. Newburg. li. 2. ca. 13. 6 H. 3. Stow. Holl. 203. 2 H. 4. Rot. Parl. nu. 29 Sautries caſe. Fitz. N. B. 269. a. 1 El. ca. 1.

[b] And the Biſhop of every Dioces may convict any for Hereſie, and ſo might he have done before the ſtatute of 2 H. 4. ca. 15. as it appeareth by the Preamble of that Act in theſe words.

[b] Vid. 13 H. 8. ca. 9. F. N. B. ubi ſupra. 5 El. ca. 23. 10 H. 7. 17. b. Doct. & Stud. lib. 2. ca. 29. Br. 2. Mar. tit. Hereſy 1.

Whereas the Dioceſans of the ſaid Realme cannot by their juriſdiction ſpirituall, without aid of the ſaid royall Majeſty, ſufficiently correct the ſaid falſe and perverſe people, (i. **Heretiques, named before**) becauſe the ſaid falſe and perverſe people doe goe from Dioces to Dioces, and will not appear before the ſaid Dioceſans, but the ſame Dioceſans and their Iuriſdiction ſpirituall, and the keys of the Church with the cenſures of the ſame, doe utterly contemn and deſpiſe.

Now that ſtatute doth provide, that the Dioceſan of the ſame place, ſuch perſon or perſons, &c. may cauſe to be arreſted, and under ſafe cuſtody in his priſons to be detained. From this Act and other Acts and Authorities quoted in the margent, theſe Two concluſions are to be gathered. Firſt, that the Dioceſan

Mat. Hammond Anno 21 El. Holl. 1579. Stowe. 1161. Hil. 9. Ja. Regis. Legates caſe.

ceſan hath juriſdiction of Hereſy, and ſo it hath been put in ure in all Queen Elizabeths reign: and accordingly it was reſolved by Flemming Chief Juſtice, Tanfield chief Baron, Williams, and Crook Juſtices, Hil. 9. Ja. R. in the caſe of Legate the Heretique, and that upon a conviction before the Ordinary of Hereſy, the writ of De hæretico comburendo doth lie. Secondly, that without the aid of that Act of 2 H. 4. the Dioceſan could impriſon no perſon accuſed of Hereſy, but was to proceed againſt him by the cenſures of the Church. And now ſeeing, that not only the ſaid Act of 2 H. 4. but 25 H. 8. c. 14. are repealed, the Dioceſan cannot impriſon any perſon accuſed of Hereſy, but muſt proceed againſt him, as he might have done before thoſe ſtatutes, by the cenſures of the Church, as it appeareth by the ſaid Act of 2 H. 4. c. 15. Likewiſe the ſuppoſed ſtatute of 5 R. 2. c. 5. and the ſtatutes of 2 H. 5. c. 7. 25 H. 8. c. 14. 1 & 2 Ph. & Mar. c. 6. are all repealed, ſo as no ſtatute made againſt Heretiques ſtandeth now in force: and at this day no perſon can be indicted, or impeached for Hereſy before any temporall Judge, or other, that hath temporall juriſdiction, as upon peruſall of the ſaid ſtatutes appeareth.

Vide 1 E. 6. c. 12. 1 El. c. 1.

25 H. 8. c. 9.

Every Archbiſhop of this Realm may cite any perſon dwelling in any Biſhops Dioces within his province for cauſes of Hereſy, if the Biſhop, or other Ordinary immediate thereunto conſent, or if that the ſame Biſhop, or other immediate Ordinary, or Judge doe not his duty in puniſhment of the ſame.

2. Touching the ſecond point, if any perſon be charged with Hereſy before the High Commiſſioners, they have no authority to adjudge any matter or cauſe to be hereſy, but only ſuch, as hath been ſo adjudged by the authority of the Canonicall Scripture, or by the firſt four generall Councells, or by any other generall Councell, wherein the ſame was declared hereſie by the expreſſe and plain words of the Canonicall Scripture, or ſuch as ſhall hereafter be determined to be hereſy by Parliament, with the aſſent of the Convocation: for ſo it is expreſly provided by the ſaid Act of 1 El. And albeit this Proviſo extendeth only to the ſaid high Commiſſioners, yet ſeeing in the high Commiſſion, there be ſo many Biſhops, and other Divines, and Learned men, it may ſerve for a good direction to others, eſpecially to the Dioceſan, being a ſole Judge in ſo weighty a cauſe.

1 El. c. 1.

No manner of Order, Act, or Determination for any matter of Religion, or cauſe Eccleſiaſticall, had or made by the Authority of the Parliament in Anno 1 El. ſhall be accepted, deemed, interpreted, or adjudged Hereſy, Schiſm, or Schiſmaticall opinion, any order, decree, ſentence, conſtitution, or law (whatſoever the ſame be) notwithſtanding.

5 R. 2. Stat. 2. cap. 5. repealed by 1 E. 6. c. 12. & 1 Eliz. c. 1.

* In diebus illis Maſters of Divinity (and Batchelors of Divinity) now Doctors of Divinity and Batchelors.

a Rot. clauſ. 19 R. 2. m. 17. in Dorſ.

b Exod. 20. 4. Levit. 26. 1. Deut. 5. 8. & 16. 22. Pſal. 97. 7. 1 John 5. 21.

c Rot. Parl. 6 R. 2. nu. 62. Vide 7 H. 4. nu. 62. Rot. Parl.

There was a ſtatute ſuppoſed to be made in 5 R. 2. that Commiſſions ſhould be by the Lord Chancellor made, & directed to Sheriffs, and others, to arreſt ſuch as ſhould be certified into the Chancery by the Biſhops, and Prelates, * Maſters of Divinity, to be preachers of hereſies, and notorious errors, their fautors, maintainers, and abetters, and to hold them in ſtrong priſon, untill they will juſtifie themſelves to the law of holy Church. By colour of this ſuppoſed Act, a certain perſons, that held, that images were not to be worſhipped, &c. were holden in ſtrong priſon, untill they (to redeem their veration) miſerably yeelded before theſe Maſters of Divinity to take an oath, and did ſwear to worſhip images, *b* which was againſt the morall and eternall law of Almighty God. We have ſaid (by colour of the ſaid ſuppoſed ſtatute, &c.) not only in reſpect of the ſaid opinion, but in reſpect alſo, that the ſaid ſuppoſed Act, was in truth never any Act of Parliament, though it was entred in the Rolls of the Parliament, for that the Commons never gave their conſent thereunto. And therefore in the *c* next Parliament, the Commons preferred a bill reciting the ſaid ſuppoſed Act, and conſtantly affirmed, that they never aſſented thereunto, and therefore deſired that the ſaid ſuppoſed ſtatute might be anienied, and declared to be void: for they proteſted, that it was never their intent to be juſtified, and to bind themſelves and their ſucceſſors to the Prelates, more then their Anceſtors had done in times paſt: and hereunto the King gave his royall aſſent in theſe words, *y pleiſt au*

Roy.

Roy. And mark well the manner of the penning the Act: for ſeeing the Commons did not aſſent thereunto, the words of the Act be, It is ordained and aſſented in this preſent Parliament, that, &c. And ſo it was, being but by the King and the Lords.

It is to be known, that of ancient time, when any Acts of Parliament were made, to the end the ſame might be publiſhed, and underſtood, eſpecially before the uſe of printing came into England, the Acts of Parliament were ingroſſed into parchment, and bundled up together with a writ in the Kings name, under the great ſeal to the Sherif of every County, ſometime in Latin, and ſometime in French, to command the Sherif to proclaim the ſaid ſtatutes within his bayliwick, as well within liberties, as without. And this was the courſe of Parliamentary proceedings, before printing came in uſe in England, and yet it continued after we had the print, till the reign of H. 7.

Now at the Parliament holden in 5 R. 2. John Braibrook Biſhop of London being Lord Chancellor of England, cauſed the ſaid Ordinance of the King and Lords to be inſerted into the Parliamentary writ of Proclamation to be proclaimed amongſt the Acts of Parliament: which writ I have ſeen, the purcloſe of which writ, after the recitall of the Acts directed to the Sherif of N. is in theſe words. Nos volentes dictas concordias, ſive ordinationes in omnibus et ſingulis ſuis Articulis inviolabiliter obſervari, tibi præcipimus quòd prædictas concordias, ſive ordinationes in locis infra baliwam tuam, ubi melius expedire volueris, tam infra libertates, quam extra, publicè proclamari, et teneri facias juxta formam prænotatam. Teſte Rege apud Weſtm. 26 May, Anno regni Regis R. 2. 5. But in the Parliamentary proclamation of the Acts paſſed in Anno 6 R. 2. the ſaid Act of 6 R. 2. whereby the ſaid ſuppoſed Act of 5 R. 2. was declared to be void, is omitted: and afterwards the ſaid ſuppoſed Act of 5 R. 2. was continually printed, and the ſaid Act of 6 R. 2. hath by the Prelates been ever from time to time kept from the print.

Certain men called Lollards were indicted for hereſy, upon the ſaid ſtatute of 2 H. 4. for theſe opinions, viz. Quod non eſt meritorium ad Sanctum Thomam, nec ad Sanctam Mariam de Walſingham peregrinari. 2. Nec imagines Crucifixi et aliorum Sanctorum adorare. 3. Nulli ſacerdoti confiteri niſi ſoli Deo, &c. Which opinions were ſo far from hereſy, as the makers of the ſtatute of 1 Eliz. had great cauſe to limit what hereſy was. Coram Rege Hil. 1 H. 5. Rot. 4. & 5.

And afterwards they thought not good to contain theſe opinions in any Indictment, but indicted them in general words, one of which indictments as to Lollardy and hereſy followeth. Jurati dicunt ſuper eorum Sacramentum, quod A. R. E. D. Lollardi & falſi hæretici die Iovis poſt hebdomadam Paſchæ, Anno regni Regis H. 6. poſt conqueſtum Nono, apud Abendon in Com' Berks infra virg. falsò et proditoriè ut communes proditores, et inſurrectores conſpiraverunt, imaginati fuerunt, et ad invicem confœderaverunt cum quamplurimis proditoribus illis aſſociatis, & felonibus de eorum comitiva, et eorum falſa malitia præcogitata, ut communes Inſidiatores altarum viarum, ad fidem catholicam deſtruendam, et ibidem falsò et proditoriè ut communes proditores, et felones dicti dñi Regis fecerunt, et ſcripſerunt diverſas falſas billas, & ſcripturas ſeditioſas, & nonnulla fidei & doctrinæ Chriſtianæ contraria continentes, & eas populo domini regis publicandas & credendas falsò, damnabiliter in diverſis locis, viz. in civitatibus London, Sarum, & villis de Coventria & Marleburgh, nequiter poſuerunt, fixerunt, & projecerunt, ac indies ſic ſcribere, affigere & projicere & ponere non ceſſant, nec formidant, in graviſſimam majeſtatis, & coronæ dignitatis Regis noſtri offenſam, & Chriſtianæ fidei ludibrium, & pacis dicti domini regis perturbationem, & omnium Chriſti fidelium injuriam & contemptum. Which generall indictment, and all other of like form were utterly inſufficient in law: For albeit the words of the ſtatute be generall, yet the indictment muſt contain certainty, whereunto the party indicted may have an anſwer. Also where the parties are indicted, ut communes inſidiatores viarum, that alſo is inſufficient, as it appeareth by the ſtatute of 4 H. 4. ca. 2.

Indictment generall. Vide ſupra ca. 1. Verbo, Per overt fait.

Lollardi & falſi hæretici.

Communes Inſidiatores viarū. Vide ſup. c. 1. f. 5.

Ad fidem Catholicam deſtruendā.

Diverſas falſas billas & ſcripturas, &c.

John

Mich. 5 E. 4. Rot. 143. Coram Rege. In rationabili parte bonorum.

John Keyſer was excommunicated by the greater excommunication before Thomas Archbiſhop of Canterbury, and Legate of the Apoſtolique See, at the ſuit of another, for a reaſonable part of goods, and ſo remained eight months: The ſaid Keyſer openly affirmed that the ſaid ſentence was not to be feared, neither did he fear it. And albeit the Archbiſhop, or his Commiſſary hath excommunicated me, yet before God I am not excommunicated: and he ſaid that he ſpake nothing but the truth, and it ſo appeared; for that he the laſt harveſt ſtanding ſo excommunicate, had as great plenty of wheat, and other grain, as any of his neighbours, ſaying to them in ſcorn (as was urged againſt him) that a man excommunicate ſhould not have ſuch plenty of wheat. The Archbiſhop denying theſe words to be within the ſaid Act of 2 H. 4. did by his warrant in writing comprehending the ſaid cauſe, by pretert of the ſaid Act commit the body of the ſaid Keyſer to the Gaol at Maidſtone, for that (ſaith he) in reſpect of the publiſhing of the ſaid words, dictum Iohannem non immeritò habemus de hæreſi ſuſpectum. By reaſon whereof the ſaid Iohn Keyſer was impriſoned in Maidſtone Gaol, and in priſon detained under the cuſtody of the Keeper there, untill by his counſell he moved Sir Iohn Markham then Chief Juſtice of England, and other the Judges of the Kings Bench, to have an Habeas corpus, and thereupon (as it ought) an Habeas corpus was granted: Upon which writ the Gaoler returned the ſaid cauſe, and ſpeciall matter, and withall, according to the writ, had his body there. The Court upon mature deliberation peruſing the ſaid ſtatute, (and upon conference with Divines) reſolved, that upon the ſaid words Keyſer was not to be ſuſpect of Hereſy within the ſaid ſtatute, as the Archbiſhop took it. And therefore the Court firſt bayled him, and after he was delivered: for that the Archbiſhop had no power by the ſaid Act for thoſe words to commit him to priſon.

Mich. 11 H. 7. Rot. 327. In communi banco.

Hillary Warner being an Inhabitant within the pariſh of S. Dunſtans in the Weſt, held opinion, & publiſhed there, & in divers other places, quòd non tenebatur ſolvere aliquas decimas Curatori, ſive Eccleſiæ parochiali ubi inhabitabat. Whereupon Richard Biſhop of London commanded Edward Vaughan and others to arreſt the ſaid Hillary Warner: by force whereof they did arreſt him, and detained him in priſon a day and a night, and then he eſcaped. Hillary Warner brought his Action of falſe impriſonment againſt Edward Vaughan and others: In bar whereof the Defendants pleaded the ſtatute of 2 H. 4. and that the Plaintif held and publiſhed the opinion aforeſaid; which opinion was, Contra fidem Catholicam, ſeu Determinationem Sanctæ Eccleſiæ, & that the Defendants, as ſervants to the ſaid Biſhop, and by his commandment did arreſt the Plaintif, and juſtified the impriſonment; whereupon Hillary Warner the Plaintif demurred in law, and after long and mature deliberation it was by Brian Chief Juſtice, and the whole Court of Common Pleas adjudged, that the ſaid opinion was not within the ſaid ſtatute of 2 H. 4. for that it was an error, but no Hereſy. Which I have the rather reported, for that the Reporter of this caſe did not only miſreport the time of the bringing of the Action, but the ſtatute, which was the ground of the matter in law, and leaveth out the judgement. The record it ſelf is worthy the reading.

Hil. 10. H 7. f. 17.

Upon that which hath been ſaid touching the ſaid ſtatute of 2 H. 4. Four concluſions doe neceſſary follow. Firſt, that ſeeing, that many opinions were by the Biſhops taken to be hereſy, which in troth had no ſhadow of hereſy, and ſo miſtaken, and unjuſtly extended by the Biſhops further then the Purview, and true intention thereof, as by that which hath been, and might be ſaid, appeared, the makers of the ſaid Act of Parliament of 1 El. had great reaſon to limit (as hath been ſaid) what opinions ſhould be judged Hereſy by authority of that commiſſion grounded upon that Act. Secondly, that if any Eccleſiaſticall Judge or Commiſſioner ſhall by pretert of any ſtatute, or other cauſe, commit any man to priſon, upon motion in Court on the behalf of the party impriſoned, the Judges of the Common Law ought to grant an Habeas corpus for him: upon the return of which writ, if it ſhall appear to the Judges, that the impriſonment is well warranted

See in the ſecond part of the Inſtitutes, the expoſition upon the ſtatute of *Artic. Cleri*, the reſolution of all the Judges of England to the 21 and 22 articles, or objections.

warranted by law, the party ſhall be remanded: and if the impriſonment be without warrant of law, then the party ought to be delivered. Thirdly, if the impriſonment be not warranted by law, the party impriſoned may have his action of falſe impriſonment, and recover his damages. Fourthly, that when an Act of Parliament is made concerning matter meerly ſpirituall, as Hereſie, &c. yet that Act being part of the lawes of the Realm, the ſame ſhall be conſtrued and interpreted by the Judges of the Common Lawes, who uſually confer with thoſe that are learned in that profeſſion. But let us now deſcend to the third point.

3. To the third. [a] It appeareth by Bracton, Britton, Fleta, Stanford, and all our Books, that he that is duly convict of Hereſie, ſhall be burnt to death.

4. To the fourth. [b] The Eccleſiaſticall Judge at this day cannot commit the perſon that is convict of Hereſie to the Sheriffe, albeit he be preſent, to be burnt; but muſt have the Kings Writ De hæretico comburendo, according to the Common Law: for now all Acts of Parliament (as hath been ſaid before) againſt Hereticks are repealed. And the reaſon wherefore Hereſie is ſo extremely and fearfully puniſhed, is, for that Gravius eſt æternam, quam temporalem lædere majeſtatem: and Hæreſis eſt lepra animæ. [c] The party duly convicted of Hereſie, may recall, and abjure his opinion, and thereby ſave his life, but a Relapſe is fatall: For as in caſe of a diſeaſe of the body, after recovery, recidivation is extremely dangerous: So in caſe of Hereſie (a diſeaſe of the ſoule) a relapſe is irrecoverable. And as he that is a Leper of his body, is to be removed from the ſociety of men, leſt he ſhould infect them, by the Kings Writ De leproſo amovendo: So he that hath lepram animæ, that is, to be convicted of Hereſie, ſhall be cut off, leſt he ſhould poyſon others, by the Kings Writ De hæretico comburendo. But if the Heretick will not after conviction abjure, he may by force of the ſaid Writ [d] De hæretico comburendo be burnt without abjuration.

5. As to the fifth. [e] The ſtatute made in the 2 year of H. 5. cap. 7. whereby the forfeiture of lands in fee-ſimple, and goods, and chattels was given in caſe of Hereſie, ſtandeth repealed by the Act of 1 Eliz. cap. 1. The Books that ſpeak of this forfeiture are grounded upon the ſaid Act of 2 H. 5. which then ſtood in force, ſaving 5 R. 2. which was before that ſtatute: for there, though Belknap ſware, Per ma foy ſi home ſoit miſereant, ſa terre eſt forfeitable, & le ſeignior averaceo p voy deſcheate; yet was his opinion never holden for law: for neither lands, nor goods [f] before the making of that ſtatute of 2 H. 5. were forfeited by the conviction of hereſie, becauſe the proceeding therein is meerely ſpirituall, pro ſalute animæ, and in a Court that is no Court of Record. And therefore the conviction of hereſie worketh no forfeiture of any thing that is temporall, viz. of lands or goods. [g] For what cauſe the ſaid hereticks were called Lollards you may reade in Caudries caſe, and Linwood thereto agreeth. * And it is to be obſerved, that in proceeding againſt Lollards, the Prelats, beſides their opinions, did charge them with hainous offences: As conſpiracy with multitudes of people, inſurrection, rebellion, or ſome other treaſon, or great crimes.

We have ſpoken thus much of this argument, becauſe there be divers wandring opinions concerning ſome of theſe points, that are not agreeable to the law, as it ſtandeth at this day. See the fourth part of the Inſtitutes, cap. Chancery, in the Articles againſt Cardinall Woolſey. Artic. 44.

[a] Mir. cap. 4. de Majeſtie. Bracton, ubi ſupra. Britton cap 9. Fleta lib. 1. ca. 35. Regiſter. F. N. B. 269.

[b] F. N. B. 269. Rot. Par. 2 H. 4. nu. 29. Sautryes caſe. Bref de hæretico comburendo per regem & concilium in Parliamento.

[c] 2 Mar. tit. Hereſie. Br. 7.

[d] 2 Mar. ubi ſupra.

[e] Vid. Doct. & Stud. lib. 2. ca. 29. Br. tit. Forfeiture 112. Stan. pl. cor. 35. I. 2 Mar. Br. tit. Hereſie.

[f] Vid. hereafter in caſe of Piracy.

[g] Lib. 5. Caudries caſe. fol. 25. b.

* 1 H. 5. fo. 6. a. Rot. Parl. 5 H. 5. nu. 11. in the caſe of Sir *John Oldcaſtle.* Paſch. 9 H. 5. *John Sharps caſe*, &c. Rot. Parl. 7 H. 4. nu. 67. 11 H. 4. nn. 29. 3 H. 5. nu. 39. 1 H. 6. nu. 20.

CAP.

CAP. VI.

Of Felony by Conjuration, VVitchcraft, Sorcery, or Inchantment.

THe firſt Act of Parliament that made any of theſe offences felony, was the ſtatute [a] of 33 H.8. which was repealed by the ſtatutes of 1 E.6. cap. 12. and 1 Mariæ. But [b] before the Conqueſt it was ſeverely puniſhed: ſometimes by death, ſometimes by exile, &c. [c] And after, it was made felony by the ſtatute of 5 Eliz. and againe by 1 Jac. which repealeth 5 Eliz.

A Conjurer is he that by the holy and powerfull names of Almighty God invokes and conjures the Devill to conſult with him, or to do ſome act.

A Witch is a perſon that hath conference with the Devill, to conſult with him or to do ſome act.

An Inchanter, Incantator, is he, or ſhe qui carminibus, aut cantiunculis Dæmonem adjurat. They were of ancient time called Carmina, becauſe in thoſe dayes their Charmes were in verſe.

Carminibus Circe ſocios mutavit Ulyſſis,
By Charmes in Rhyme (O cruell Fates!)
Circe transform'd Vlyſſes mates.

And again. Carmina de Cœlo poſſunt detrudere Lunam,
By Rhymes they can pul down full ſoon,
From lofty ſky the wandring Moon.

* A Sorcerer, Sortilegus, quia utitur ſortibus in cantationibus Dæmonis. Thou ſhalt not ſuffer a Witch to live. Non eſt augurium in Jacob, nec divinatio in Iſrael. And the Holy Ghoſt hath compared the great offence of Rebellion to the ſinne of Witchcraft.

And here it juſtly may be demanded, what puniſhment was againſt theſe devilish & wicked offenders before theſe ſtatutes, which were made of very late time.

And it appeareth by our ancient [d] books that theſe horrible and devilish offenders, which left the everliving God, and ſacrificed to the Devill, and thereby committed Idolatry, in ſeeking advice and aide of him, were puniſhed by death. * The Mirror ſaith, Que ſorcery & devinal ſont members de Hereſie. And there he deſcribeth Hereſie. Hereſie eſt un mauvaſe & faux creance ſurdant de error en la droit foy Chriſtien: and after ſaith, Le judgement de Hereſie eſt dée arſe in cendre. And herewith agreeth Britton: Sorcerers, Sorcereſſes, &c. & miſcreants ſoient arſes. And Fleta: Chriſtiani autem Apoſtatæ, ſortilegi, & hujuſmodi detractari debent, & comburi. And burning then was, and yet is the puniſhment for Hereticks. So as the conuſance of theſe offences, if they be branches of hereſie, (as the law was then taken) belonged (as to this day hereſie doth) to Eccleſiaſticall Judges. In which caſe when they have given ſentence, there lieth a Writ De hæretico comburendo.

I have ſeen a report of a caſe in an ancient Regiſter, that in October Anno 20 H. 6. Margery Gurdeman of Eye, in the County of Suffolk, was for Witchcraft and conſultation with the Devill, after ſentence and a relapſe, burnt by the Kings Writ De hæretico comburendo. [e] And this agreeth with Antiquity, for Witches, &c. by the laws before the Conqueſt were burnt to death.

A man was taken in Southwark with a head and a face of a dead man, and with a book of Sorcery in his male, and was brought into the Kings Bench before Sir John Knevett then Chief Juſtice: but ſeeing no indictment was againſt him, the Clerks did ſwear him, that from thenceforth * he ſhould not be a Sorcerer, and was delivered out of priſon, and the head of the dead man and the book of

[a] 33 H.8. ca.8. 1 E.6. cap.12.
[b] Inter leges Alveredi fo.23. Edwardi & Guthruni, cap.11. Ethelſtani, ca.6. Canuti. 4,5.
[c] 5 Eliz. ca.16. 1 Jac. cap.12.
A Conjurer deſcribed.
A Witch deſcribed.
An Inchanter deſcribed.
* A Sorcerer deſcribed. Exod. cap. 22.17. Deut. ca.18.10, 11,12. Num. ca.23.23. 1 Reg. ca.15.23.
[d] Linwood de officio Archi-presb. § Igmeantia. * Mir. cap.1.§ 5. & cap. 2.§ 12. & cap.4. § De Majeſtie. Brit. fo.16.b. &71. F.N.B.269.b.
[e] Int. leges Edw. ca.11.fo.55. & Ethelſtani ca. 6.fo.60. & Canuti cap. 5. fo.5. 45 E3.17.b.
* Some think this ſhould be the Oath of Allegiance, *Que il ſerra foiall et loiall, &c.* Vid. 25 E.3.42.b. coron.131. See hereafter ca.74. of perjury, Verb. That as well the Judge, &c.

of Sorcery were burnt at Tuthill at the coſts of the priſoner. So as the head and his book of Sorcery had the ſame punishment, that the Sorcerer ſhould have had by the ancient law, if he had by his ſorcery praied in aid of the Devill.

The Holy Hiſtory hath a moſt remarkable place concerning the reprobation and death of King Saul. Mortuus eſt ergo Saul propter iniquitates ſuas, eò quòd prævaricatus ſit mandatum Domini, & non cuſtodierit illud,* ſed inſuper Pythonissam conſuluerit, nec ſperaverit in Domino, propter quod interfecit eum, & tranſtulit regnum ejus ad David filium Iſai. So Saul died for his tranſgreſſion which he committed againſt the Lord, even againſt the Word of the Lord which he kept not: And alſo for asking counſell of one that had a Familiar Spirit, to enquire of it, and enquired not of the Lord; therefore he ſlew him, and turned the kingdome unto David the ſonne of Iſai. 1 Chron. chap. 10. v. 13, 14. 1 Reg. 15. 23. * Nota. 1 Reg. 28. 8.

Therefore it had been a great defect in government, if ſo great an abomination had paſſed with impunity. And this is the cauſe, that we have proved how and in what manner Conjuration, Witchcraft, &c. were puniſhed by death, &c. before the making of the ſaid late ſtatutes.

But now let us peruſe the Statute made in the firſt year of King James, which only ſtandeth in force, and divideth it ſelf into Five ſeverall branches. 1 Jac. cap. 12.

1. ¶ If any perſon or perſons ſhall uſe, practiſe, or exerciſe any Invocation or Conjuration of any evill and wicked Spirit.

Here the Devill by the holy, and powerfull names of Almighty God is invoked (as hath been ſaid:) and this invocation, or conjuration of a wicked Spirit is felony without any other act or thing, ſave only the apparition of the ſpirit. See W. 1. cap. 1. in the Oath of the Champion, &c.

2. ¶ Or ſhall conſult, covenant with, entertaine, employ, feed, or reward, any evill or wicked Spirit, to, or for any intent or purpoſe.

By this branch, if any conſult, &c. (howſoever the wicked ſpirit appeareth and commeth) theſe actions (here mentioned) with or to that wicked ſpirit, to or for any intent or purpoſe, is felony without any other act or thing.

3. ¶ Or take up any dead man, woman, or childe, out of his, her, or their grave, or any other place where the dead body reſteth, or the skin, bone, or any part of a dead perſon, to be imployed or uſed in any manner of Witchcraft, Sorcery, Charme, or Inchantment.

Albeit the offender that commits theſe barbarous, and inhumane dealings with the bodies of the dead, do not actually imploy or uſe them in witchcraft, ſorcery, charme, or inchantment: yet if he did them of purpoſe to uſe therein, it is felony, for the words of this branch be, [to be imployed or uſed in any manner of witchcraft, &c.]

4. ¶ Or ſhall uſe, practiſe, or exerciſe any Witchcraft, Inchantment, Charme or Sorcery, whereby any perſon ſhall be killed, deſtroyed, waſted, conſumed, pined, or lamed, in his, or her bodie, or any part thereof.

By this branch, no other witchcraft, inchantment, charme, or ſorcery (then is before ſpecified) is felony, unleſſe by means thereof ſome perſon be killed, deſtroied, waſted, conſumed, pined or lamed, &c. Which words have reference only to this laſt generall clauſe.

5. ¶ That then every ſuch offender or offenders, their aiders, abetters, and counſellors, being of any the ſaid offences duly and lawfully convicted, and attainted, ſhall ſuffer paines of death, as a felon, or felons, and ſhall loſe the priviledge, and benefit of Clergie and anctuary.

Albeit acceſſories before be here ſpecially named, yet acceſſories after may be of this felony, as afterwards is ſaid upon the ſtatute of 3 H. 7. for taking away of women, and upon the ſtatute of 8 H. 6. for ſtealing of Records.

The ſecond part of this Act concerneth Felony in a ſecond degree; and the branches thereof are alſo in number Five.

¶ 1. If any perſon, or perſons take upon him or them by Witchcraft, Inchantment, Charme, or Sorcery, to tell or declare, in what place any treaſure of gold or ſilver ſhould or might be found, or had in the earth, or other ſecret places.

The miſchiefs before this part of this Act was: That divers Impoſtors, Men and Women would take upon them to tell, or do, theſe Five things here ſpecified, in great deceipt of the people, and cheating and couſening them of their money, or other goods. Therefore was this part of the Act made, wherein theſe words [take upon him or them] are very remarkable. For if they take upon them, &c. though in truth they do it not, nor can do it, yet are they in danger of this firſt branch.

¶ 2. Or where goods, or other things loſt, or ſtoln ſhould be found or become.

Herein they become offenders, if they take upon them as aforeſaid. And note, the taking upon them, to tell and declare, goverene both theſe branches.

¶ 3. Or to the intent to provoke any perſon to unlawfull love.

Herein alſo they become offenders, by taking upon them, as is aforeſaid. Here is the change of a new Verbe, viz. [to provoke] So as the ſenſe is, If any perſon or perſons ſhall take upon him or them by witchcraft, inchantment, charme or ſorcery, to the intent, to provoke any perſon to unlawfull love.

¶ 4. Or whereby any cattell or goods of any perſon ſhall be deſtroyed.

The Letter of this branch is this: If any perſon ſhall take upon him by witchcraft, inchantment, charm, or ſorcery, whereby any cattell or goods of any perſon ſhould be deſtroyed. Although this be not ſententious, yet the meaning thereof is to be taken, by ſupplying theſe words after ſorcery [any thing] and not to turn [deſtroyed] into the Infinitive Mood, as the reſt be; for then it ſatisfieth not the meaning of the makers: for a taking upon them to deſtroy cattell, &c. if they be not deſtroyed, is not within the danger of this Act, and therefore muſt be ſupplyed as is aforeſaid.

¶ 5. Or to hurt or deſtroy any perſon in his or her body, although the ſame be not effected or done.

As in the caſe of cattell or goods, the deſtruction muſt be (as is aforeſaid) effected and done: ſo in caſe of the perſon of man, woman, or childe, though the hurt be not effected, or done; yet is the taking upon him, &c. to hurt or deſtroy any perſon, &c. within this branch.

¶ Being therefore lawfully convicted.

Here [convicted] is taken in a large ſenſe for attainted, and the rather, for that after in this Act the words be [lawfully convicted and attainted, as is aforeſaid.]

¶ Shall for the ſaid offence, &c.

Here are expreſſed the puniſhments inflicted upon theſe Impoſtors, Mountebanks, and cheating Quackſalvers, viz. 1. To ſuffer impriſonment by the ſpace of a whole year without bail or mainprize. 2. Once every quarter of the year theſe Mountebanks are to mount the Pillory, and to ſtand thereupon in ſome Market Towne ſix houres, and there to confeſſe his or her error, and offence.

¶ And if any perſon being once convicted of the ſame offences, &c.

Here is alſo [convicted] taken for attainted, for he ſhall not be drawn in queſtion for the ſecond offence, to make it felony, till judgement be given againſt him for the firſt; for the Indictment of felony recites the former attainder, and the ſecond offence muſt be committed after the judgement. And ſo it is in the caſe of Forgery upon the ſtatute of 5 Eliz. and in caſe of conveighing of Sheep alive out of this Realme, and ſome others.

5 Eliz. cap. 14.
8 Eliz. cap. 3.

¶ Saving to the wife of ſuch perſon as ſhall offend in any thing contrary to this Act, her title of dower, and alſo to the heire and ſucceſſor

ceſſor, of every perſon, his or their titles of inheritance, ſucceſſion, and other rights, as though no ſuch attainder of the Anceſtor or Predeceſſor had been made.]

The judgement againſt a felon is, that he be hanged by the neck untill he be dead: and albeit nothing elſe is expreſſed in the judgement, yet by the Common law many things are therein implied; as the loſſe of his wives Dower, the loſſe of his inheritance, corruption of his blood, forfeiture of his goods, &c. Now a ſaving will ſerve for any thing, that is implied in the judgement, as in this caſe for the wives Dower, and alſo for the heirs inheritance, and for all the reſt of the things implied in the judgement. But a ſaving will not ſerve againſt the expreſſe judgement in caſe of felony, for that ſhould be repugnant; as ſaving the life of the offender ſhould be void, becauſe it is repugnant to the expreſſe judgement, viz. that he be hanged by the neck untill he be dead. Alſo where the ſaving is to the heir, it is well ſaved by the name of the heir, becauſe notwithſtanding the forfeiture implied in the judgement, his inheritance is ſaved, and by conſequent the blood not corrupted, for if the blood were corrupted, he could not inherit as heir, but notwithſtanding this ſaving the lands are forfeited during his life.

See the 1. part of the Inſtitutes. Sect. 747.

Vide lib. 1. in the caſe of Alton Woods. fo.

The ſtatute af 5 Eliz. for preſervation of the wives Dower, and the heirs inheritance, in caſe of forgery, is penned in this form. Provided alway, that ſuch attainder of felony ſhall not in any wiſe extend to take away the Dower of the wife of any ſuch perſon attaint: nor to the corruption of blood, or diſheriſon of any heir or heirs of any ſuch perſon attaint.

5 El. cap. 14.

The words of the ſtatute of 8 Eliz. be, Provided always that this Act ſhall not extend to corruption of blood, or be prejudiciall or hurtfull to any woman claiming Dower by or from any ſuch offender, &c. Wherein it is to be obſerved, that by the avoidance of corruption of blood, the inheritance is impliedly ſaved. See the manner of the penning of the Act of 31 Eliz. concerning this matter and divers others.

8 El. ca. 3.

31 El. ca. 4.

And ſurely it is very convenient that when new felonies be made by Act of Parliament, that ſuch ſavings or proviſions be made both for the wives Dower, and the heirs inheritance, as were had and made in theſe preſidents.

See the Statute of 3 Ja. ca. 4.

CAP. VII.

Of Murder.

HAving now paſſed High treaſon, Petit treaſon, Miſpriſion of treaſon, Felony by the ſtatute of 3 H. 7. Hereſy, and Conjuration, Witchcraft, &c. We are next in order to treat of felonies in generall: and of all felonies, murder is the moſt hainous. Inter leges Canuti ca. 61. fo. 118. Cædes manifeſtæ numerantur inter ſcelera nullo humano jure expiabilia. See here ca. Pardon. And of all murders, murder by poyſoning is the moſt deteſtable. Therefore firſt of murder. Murdrum is derived of the Saxon word Mord.

[a] See the 1. pt of the Inſtit. for the word Murder. ſect. 287. and for Felony. Sect. 500 & 745. See the 2. part of Inſtit. Marlbr. ca. 25. Cuſt. de Norm. cap. 68.

[b] Murder is when a man of ſound memory, and of the age of diſcretion, unlawfully killeth within any County of the Realm any reaſonable creature in rerum natura under the Kings peace, with malice fore-thought, either expreſſed by the party, or implied by law, ſo as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the ſame.

b The definition of murder. Vid. devant. ca. Treaſon. Verb. Quant home, &c. Bract. l. 3. fo. 120, 121. 134, 135. Brit. fo. 5. 18. Fleta lib. 1.

Hereof we will ſpeak, together with ſome things concerning the acceſſories to the ſame, and leave the reſidue to others, that have written thereof. Now let us examine the principall parts of this deſcription.

cap. 23. & 30. Mirror cap. 1. §. ca. 2. §. 11. de Appeal de homicide. Tr. 32 E. 1. Coram Rege Rot. 15. 25 E. 3. 28 26 Aſſ. p. 27. 3 E. 3. cor. 383. 3 H. 7. ca. 1. 3 H. 7. 1. 12. 21 H. 7. 31. E. 2 Coron. 389. 1 Ma. Dier 104. b. See the firſt part of the Inſtit. 104.

Tr. 31 E.3. Coram rege. Rot.54. Per morſ. canis.

¶ Killing.] As by Poyſon, Weapon ſharp, or blunt, Gun, Crosbow, Cruſhing, Bruiſing, Smothering, Suffocating, Strangling, Drowning, Burning, Burying, famiſhing, throwing down, inciting a dog or bear, &c. to bite, or hurt, &c. whereof death enſueth, laying a ſick man in the cold, &c.

Bract. l.3.f.121. Brit.fo.14. See lib. Intr. Coke 25. Lib.4.fo.44. Vauxes caſe. Lib.9.fo.81. Agnes Gores caſe. Deut.28.24. Curſed is he that ſmiteth his neighbour ſecretly.

Poyſon, (Venenum, à venis, quia à venis permeat) is, as hath been ſaid, the moſt deteſtable of all, becauſe it is moſt horrible, and fearfull to the nature of man, and of all others can be leaſt prevented, either by manhood, or providence: and that made Fleta to ſay, Item nec per patriam ſe defendere debet quis de veneno dato, ſed tantum per corpus ſuum, eo quod initium facti non fuit tam publicum, quod ſciri poterit à patria, &c. but that is not holden for law at this day.

[a] 22 H.8.ca.9. Read the ſtatute. Dier 33 H 8. fol.50.a. Saccombes caſe. [b] Anno 33 H.8.

[a] This offence was ſo odious, that by Act of Parliament it was made High Treaſon, and inflicted a more grievous and lingring death then the Common law preſcribed, viz. That the offender ſhould be boyled to death in hot water: Upon which ſtatute [b] Margaret Davy a young woman was attainted of High Treaſon for poyſoning of her miſtris, and ſome others were boyled to death in Smithfield the 17 day of March in the ſame yeer. But this Act was too ſevere to live long, and therefore was repealed by 1 E. 6. cap. 12. and 1 Mar. cap. 1.

Britton fo.14.

All the ancient Authors, Ubi ſupra, of old time defined murder to be, Occulta hominis occiſio, &c. when it was done in ſecret, ſo as the offender was not known: but now it is taken in a larger ſenſe.

Britton mentioneth another kind of murder (which is not holden for murder at this day) when he ſaith: Ceux auxi que fauxement pur lower, ou en autre manner ount aſcun home damne ou fait damner au mort, &c. yet this is murder before God. And David killed Uriah with his pen, and theſe men with their tongue.

[c] 13 H.4.5 & 6. Stanf. pl.cor.65. Mic.25 & 26 El. So reſolved in Dowties caſe. [d] 13 R.2.ca.2. 1 H.4.c.14. Rot.Parl. 8 H.6. nu.38.

¶ Within any County of the Realm.] [c] If two of the Kings ſubjects goe over into a forain Realm and fight there, and the one kill the other, this murder being done out of the Realm, cannot be for want of triall heard and determined by the Common law: [d] but it may be heard and determined before the Conſtable and Marſhall.

If A. give B. a mortall wound in a forain Country, B. commeth into England and dieth: this cannot be tried by the Common law, becauſe the ſtroak was given there, where no Viſne can come, but the ſame ſhall be heard and determined before the Conſtable and Marſhall: for the words of the ſtatute of 13 R.2. be: To the Conſtable it pertaineth to have conuſance of Contracts, concerning deeds of arms, or of war out of the Realm, and alſo of things that touch arms, or war within the Realm, which cannot be determined or diſcuſſed by the Common law.

13 R.2.ca.2.

Lib.2.fo.93. Tr. 25 Eliz. in Lacyes caſe. Forteſcue ca.32. fo.38.

If a man be ſtrucken upon the high ſea, and dieth of the ſame ſtroke upon the land, this cannot be inquired of by the Common law, becauſe no Viſne can come from the place, where the ſtroke was given (though it were within the ſea pertaining to the Realm of England, and within the liegeance of the King) becauſe it is not within any of the Counties of the Realm. Neither can the Admirall hear and determine this murder, becauſe though the ſtroke was within his juriſdiction, yet the death was infra corpus comitatus, whereof he cannot inquire: neither is it within the ſtatute of 28 H.8. becauſe the murder was not committed on the ſea. But by the ſaid Act of 13 R.2. the Conſtable and Marſhall may hear and determine the ſame. And before the making of the ſtatute of 2 E.6. If a man had been feloniouſly ſtrucken, or poyſoned in one County, and after had died in another County, no ſufficient Indictment could thereof have been taken in either of the ſaid Counties, becauſe by the law of the Realm, the Jurors of one County could not inquire of that, which was done in an other County. It is provided by that Act that the Indictment may be taken, and the Appeal brought in that County, where the death doth happen. Before the making

28 H.8.ca.13.

2 E.6.ca.24.

king of this ſtatute, the Appeal might have been brought in either of the ſaid Counties, but the triall muſt have been out of both: but when both Counties cou'd not joyn, then both Appeal and Indictment failed at the Common law. 18 E.3.32. 9 H.6.63. 3 H.7.12. 4 H.7.18. 6 H.7.10.

But here be two things to be obſerved: Firſt, that in caſe of treaſon or miſpriſion thereof, or of felony, or miſpriſion of the ſame within the Realm, the party ought to be indicted within the ſame County, where the fact is done, and it cannot be alledged in any other County, then in truth where it was done. And therefore in the caſe above ſaid, neither the ſtroke, nor poyſoning, nor the death, though they be tranſitory, can be alledged in the Indictment or Appeal, but where in truth they were done. Secondly, the ſtatute of 2 E.6. extendeth not where one is ſtricken or poyſoned on the ſea, or in any forain Kingdome, and dieth in England, but where one is ſtricken or poyſoned in one County, and dieth in another.

This Act extendeth, where the murder, or felony is done in one County, and another ſhall be acceſſory in another County: whereof you may read at large in the Lord Sanchars caſe. Lib 9.fo.117, 118.&c.

Richard Weſton being Sir Thomas Overburies Keeper in the Tower of London, did poyſon him in that part of the Tower which is within London. R. Earl of S. and F. his wife, James Franklin and Anne Turner were acceſſories before the fact in the County of Midd. and Sir Gervaſe Helwys Lieutenant of the Tower was acceſſory before the fact in London. Now upon this ſtatute of 2 E.6.ca.24. divers queſtions were reſolved: Firſt, if the acceſſory be in Midd. where the Kings Bench ſit, and the principall is attainted in another County, the Kings Bench may try the acceſſory, as it was reſolved in the Lord Sanchars caſe, Ubi ſupra. 2. If the Indictment of the acceſſory be taken in the Kings Bench, the Juſtices ſhall not by force of the ſtatute of 2 E.6. write in their own names, quia placita ſunt coram Rege, & non coram Juſticiariis, but remove the Record by the Kings writ of Certiorari. 3. Divers preſidents were ſhewn, that where acceſſories before the fact were in Midd. where the Kings Bench did ſit, &c. and the attainder of the principall had been in another County, the Juſtices of the Kings Bench have removed the attainder by writ of Certiorari before them. See the Lord Sanchars caſe, Ubi ſupra, and another caſe where the principall was attainted in the County of Oxon, before Juſtices of Oier and Terminer, and the acceſſory was in Midd. where the Kings Bench ſate. 4. Richard Weſton being attainted as principall in the city of London, proceeding was to be had againſt James Frankling and Anne Turner in the Kings Bench where they were indicted. The queſtion was, if the Kings Bench ſhould remove the record of the attainder of the principall by Certiorari before them, and after the ſaid Earl and his wife ſhould be tryed by their Peers before the Lord Steward, whether the Lord Steward might write to the Kings Bench for the record of the attainder: for the words of 2 E.6. be, Shall write to the Cuſtos Rotulorum, or Keepers of the Record where ſuch principall ſhall hereafter be attainted or convict. And to prevent all doubts, a ſpeciall writ was directed according to the words of the Act, to the Commiſſioners of Oier and Terminer, to certifie whether the principall was attainted, convicted, or acquited, and they made a particular certificate accordingly: ſo as the record of the attainder remained ſtill with the Commiſſioners of Oier and Terminer in London. 5. It was reſolved upon conſideration had of the whole Act, that the words of the Act being, the Juſtices of Gaol Delivery, or of Oier and Terminer, or other there authorized, ſhall proceed, &c. the ſame extend to the High Steward to write, &c. Mich. 13.Jac. Regis. Sir Thomas Overburies caſe. See hereafter ca.62. of Indictments more of this caſe.

The Indictment of Richard Weſton was, that he 9 Die Maii Anno 11. Regis Jacobi, &c. gave to Sir Thomas Overbury a poyſon called Roſeacre in broth, which Sir Thomas Overbury not knowing it, received, Et ut idem Ric. Weſton præfatum Thomam Overbury magis celeriter interficeret, & murdraret, 1 Junii Anno 11 Jac. Regis, gave unto him another poyſon called white Arſenick. And that Richard Weſton 10 Julii, Anno 11. Jac. Regis, gave unto him

him poyſon, called Mercury ſublimat, in Tarts, &c. ut præd. Thomam magis celeriter interfieeret, & murdraret. And that a perſon unknown, by the procurement, and in the preſence of Richard Weſton, 14 Septemb. 11. ſupradicto, gave to the ſaid Thomas a Glyſter with poyſon in it, called Mercury ſublimat, &c. ut præd. Thomam magis celeriter interficeret & murdraret. Et prædict. Thomas Overbury de ſeparalibus venenis prædict. & operatione inde à prædict. ſeparalibus temporibus, &c. graviter languebat uſque 15 diem Septemb. Anno 11 ſupradicto, quo quidem 15 die Septembris, &c. prædictus Thomas de ſeparalibus venenis prædictis obiit venenatus. And this was reſolved to be a good Indictment by all the Juſtices of the Kings Bench, although it doth not appeare in particular, of which of the ſaid poyſons he died. For the ſubſtance of the Indictment was, whether he was poyſoned or no, by the ſaid Richard Weſton. And upon this indictment he was arraigned, pleaded not guilty, and had judgement given againſt him. And afterward Anne Turner, Sir Gervaſe Helwys Lieutenant of the Tower, and Richard Franklin the Phyſitian, were indicted as acceſſories before the fact, and arraigned, and pleaded not guilty: and it fell out in evidence, that Frankling had prepared divers other poyſons, then were contained in the indictment, as the powder of Diamonds, the powder of Spiders, Lapis Cauſticus, and Cantharides, over and beſides the poyſons in the indictment. And it was reſolved, that any of theſe was ſufficient to prove the indictment; for the ſubſtance of the indictment was poyſoning, which (as hath been ſaid) is ſecret: See Machallis caſe ubi ſupra. and after verdict, judgement was given againſt all theſe acceſſories. And after, the ſaid Earle and the Counteſſe his wife were indicted as acceſſories before the fact, and were arraigned before the Lord Chancellor of England, and hac vice, Lord High Steward of England: and upon the arraignment of the Counteſſe, ſhe confeſſed the indictment: and when the Clerk of the Crown did ask her, What ſhe could ſay why judgement of death ſhould not be given againſt her? ſhe ſaid, That ſhe could ſay much againſt her ſelfe, but nothing for her ſelfe. And then the Lord Steward gave judgement of death againſt her, viz. That ſhe ſhould be hanged by the neck till ſhe were dead: and adjourned his Commiſſion, (as it was reſolved he might do by Law) untill the next day: and then the ſaid Earle was arraigned, and pleaded not guilty, and put himſelf upon his Peers, who found him guilty: and thereupon the Lord Steward gave the like judgement againſt him. Which caſe we have recited the more largely for two cauſes. Firſt, for that we remember not any of the Nobility of this Realm to have been attainted in former times for poyſoning of any. Secondly, for that it is the firſt caſe that fell out upon the ſaid Act of 2 E. 6. in caſe of triall by Peers of any that was Noble, and the proceeding herein was by great adviſement. But now let us return where we left.

¶ Reaſonable creature, in rerum natura.] As man, woman, childe, ſubject born, or Alien, perſons outlawed, or otherwiſe attainted of treaſon, felony, or præmunire, Chriſtian, Jew, Heathen, Turk, or other Infidell, being under the Kings peace.

a Chro. de Dunſtable, Holl. 252. Coram Juſtic. Itiner. in Com. Kanc. 18 E. 1. See the ſecond part of the Inſt. cap. ſtat. de Judaiſmo.

a A Maſter of a ſhip and divers Mariners, &c. were attainted of murder before Juſtices in Eire, for drowning of many Jewes within the County of Kent.

b 22 E. 3. Coron. 263. 8 E. 2. Cor. 418. Stan. p. Cor. 21. c.

b If a woman be quick with childe, and by a Potion or otherwiſe killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and ſhe is delivered of a dead childe, this is a great miſpriſion, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cauſe, this is murder: for in law it is accounted a reaſonable creature, in rerum natura, when it is born alive. And the c Book in 1 E. 3. was never holden for law. And 3 Aſſ. p. 2. is but a repetition of that caſe. And ſo horrible an offence ſhould not go unpuniſhed. And ſo was the law holden d in Bractons time, Si aliquis qui mulierem prægnantem percuſſerit, vel ei venenum dederit, per quod fecerit abortivum, ſi puerperium jam formatum fuerit; & maximè ſi fuerit animatum, facit homicidium. And herewith agreeth Fleta: and herein the law is grounded upon the

c 1 E. 3. 23, 24. 3 Aſſ. p. 2.

d Bract. li. 3. f. 21. Fleta, lib. ca. 23.

law

law of God, which ſaith, Quicunque effuderit humanum ſanguinem, fundetur ſanguis illius, ad imaginem quippe Dei creatus eſt homo. If a man counſell a woman to kill the childe within her wombe, when it ſhall be born, and after ſhe is delivered of the childe, ſhe killeth it; the counſellor is an acceſſory to the murder, and yet at the time of the commandement, or counſell, no murder could be committed of the childe in utero matris: the reaſon of which caſe proveth well the other caſe. Geneſis, c. 6. v. 6. Dier. 3 Eliz. fol. 186.

¶ Malice prepenſed.] First let us ſee what this malice is.

Malice prepenſed is, when one compaſſeth to kill, wound, or beat another, & doth it ſedato animo. This is ſaid in law to be malice forethought, prepenſed, malitia præcogitata. This malice is ſo odious in law, as though it be intended againſt one, it ſhall be extended towards another. * Si quis unum percuſſerit, cum alium percutere vellet, in felonia tenetur. Dier. 3 Mar. 128. Pl. Com. 474, 475, 476. Lib. 9. fol. 81. Agnes Gores caſe. * Bracton, lib. 3. fol. 155.

Mandata recipiunt ſtrictam interpretationem, ſed illicita latam & extenſivam. But herein there is a diverſity between the principall and the acceſſory. For if A command B, to kill C, and B by miſtaking killeth D in ſtead of C, this is murder in B becauſe he did the act: and it ſprang out of the root of malice, and the law ſhall couple the event to the cauſe: but A is not acceſſory, becauſe his commandement was not purſued; and his conſent, which muſt make him acceſſory, cannot be drawne to it, for he never commanded the death of D. But where death enſueth upon that act which is commanded, though death it ſelfe be not commanded, there he is acceſſory to it, for there the commandement is the cauſe of death. As if A command B to beat C, and he beat him, whereof he dieth: the commander is acceſſory, and therefore the diverſity is apparent, as to the acceſſory. Where death is purſuant, and followeth upon the act commanded, there the conſent of the commander may well be drawn to it, for that the commandement is the mean of the death. But where death enſueth upon another diſtinct cauſe, there the conſent of the acceſſory cannot be drawn to it, & ſic de cæteris.

Another diverſity there is, when the commandement extends expreſſly to the killing of another, and for the better accompliſhment thereof preſcribeth a mean; that is, to kill him by poyſon, and he killeth him with a Gun, he is acceſſory: for the commandement was to kill, which enſued, though the mean was not followed, & finis rei attendendus eſt. And the ſubſtance of the commandement, viz. [to kill] is purſued: and the ſame offence, that was commanded, is committed. But otherwiſe it is, if the ſame offence which is commanded be not committed. As if one command one to rob the Vintners man of Plate, as he is to come to a Gentlemans chamber to his ſupper with wine; and he breaketh the Taverne in the night, and ſtealeth the plate there; the commander is not acceſſory to this Burglary, for this is another offence then he commanded, and the conſent of the acceſſory muſt be drawn to the murder or felony committed.

2. It muſt be malice continuing untill the mortall wound, or the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occaſion fall out, and the one killeth the other; this is Homicide, but no murder, becauſe the former malice continued not.

If A command B to kill C, and before the act be done, A repenteth and countermand his commandement, and charge B not to do it: if B after killeth him, A is not acceſſory to it: for the malicious minde of the acceſſory ought to continue to do ill untill the act done. Pl. Com. ubi ſup.

If two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their weapon, and go into the field, and therein fight, the one killeth the other: here is no malice prepenſed, for the fetching of the weapon and going into the field, is but a continuance of the ſudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is malice prepenſed.

¶ Malice implyed, is in three caſes.] First, in reſpect of the manner

ner of the deed. As if one killeth another without any prouocation of the part of him, that is ſlain, the law implieth malice: whereof you may read lib. 9. fol. 67. Mackallyes caſe. Alſo the poyſoning of any man, whereof he dieth within the year, implieth malice, and is adjudged wilfull murder of malice prepenſed. One may be poyſoned Four manner of ways: Guſtu by taſte, that is, by eating, or drinking, being infuſed into his meat or drink: Anhelitu, by taking in of breath, as by a poyſonous perfume in a chamber, or other room: 3. Contactu, by touching: and laſtly, Suppoſitu, as by a glyſter or the like. Now for the better finding out of this horrible offence, there be divers kindes of poyſons, as the powder of Diamonds, the powder of Spiders, Lapis cauſticus, (the chief ingredient whereof is Soap) Cantharides, Mercury ſublimate, Arſenick, Roſeacre, &c.

Lib.9.fo.67.b. in Mackallies caſe. 1 E.6.c.12.

Lib.9.fo.68.

2. In reſpect of the perſon ſlain. As if a Magiſtrate or known officer, or any other, that hath lawfull warrant, and in doing, or offering to doe his office, or to execute his warrant, is ſlain, this is murder, by malice implied by law, as the Sherif, Juſtice of Peace, Underſherif, chief Conſtable, petit Conſtable, or any other miniſter of the King. If a man kill a watchman doing his office, it is murder: ſo it is, if any, that come in aid of the Kings officer, &c. to doe his office, be ſlain, it is murder.

Mackallies caſe. Ubi ſupra. Lib.4.fo.40.b. 41.a. Youngs caſe. Mackallies caſe Ubi ſupra.

3. In reſpect of the perſon killing. If A. aſſault B. to rob him, and in reſiſting A. killeth B. this is murder by malice implied, albeit he never ſaw or knew him before. If a priſoner by the dures of the Gaoler, commeth to untimely death, this is murder in the Gaoler, and the law implieth malice in reſpect of the cruelty. And this is the cauſe, that if any man dieth in priſon, the Coroner ought to ſit upon his body, to the end it may be inquired of, whether he came to his death by the dures of the Gaoler, or otherwiſe: all which appeareth in Britton: and this ſitting of the Coroner continueth till this day.

Brit.ca.11. De priſons fo. 18.a. See the Mirror cap.2.§.11. De Homicide. 5 H.6.58. 27 Aſſ.p.41.

If the Sherif, or other officer, where he ought to hang the party attainted, according to his judgement and his charge, will againſt the law, of his own wrong, burn or behead him, or è converſo; the law in this caſe implieth malice in him. Neither can the King by any warrant under the great Seal alter the execution, otherwiſe then the judgement of law doth direct: for it is a Maxime in law, Non alio modo puniatur quis, quàm ſecundum quod ſe habeat condemnatio. And it is to be known, that in caſe of treaſon and felony, there is an expreſſe judgment, and an implied judgement: Expreſſe, when upon appearance, &c. an expreſſe judgement is given againſt him, quòd ſuſpendatur per collum. Implied, when the offender makes default, and is outlawed, where the judgement is, Ideo utlagetur; or in caſe of abjuration, quia abjuravit regnum: and yet the like execution ſhall be in caſe of outlawry or Abjuration, as in caſe of an expreſſe judgement, and ſo it was adjudged in caſe of a perſon outlawed for felony, he ought to be hanged untill he be dead, and cannot be beheaded, * and the like is in caſe of abjuration. But in caſe of High treaſon, becauſe beheading is parcell of the judgement, the King may pardon all the reſidue of the execution except that: for ſeeing the King may pardon the whole execution, he may pardon any part, or all, ſaving part. If a Lieutenant, or other that hath commiſſion of Marſhall authority, in time of peace hang, or otherwiſe execute any man by colour of Marſhall law, this is murder, for this is againſt Magna Charta cap. 29. and is done by ſuch power and ſtrength, as the party cannot defend himſelf; and here the law implieth malice. Vide Paſch. 14. E. 3. in Scaccario the Abbot of Ramſeys caſe in a writ of Error in part abridged by Fitzh. tit. Scire fac. 122. for time of peace.

Bract.l.3.fo.104.

See hereafter in the title of Sanctuary for Abjuration. Paſch.20 R.2. Coram Rege Linc.Ro.58. * Mich. 1 R.2. Coram Rege Rot.1. Bedf. See hereafter cap.Iudgement & execution. a Paſch. 39 E.3. Coram Rege Rot.92.Wiltes. Simile Paſch. 28 E.3. Coram Rege Rot.37. In caſe de Mortimer, who was put to death Anno 1 E.3. Vide Rot.Brevium Anno 1 E.3. part. 1.

a Thom, Countee de Lancaſter being taken in an open inſurrection, was by judgement of Marſhall law put to death, in Anno 14 E.4. This was adjudged to be unlawfull, eò quòd non fuit arrainiatus, ſeu ad reſponſionem poſitus tempore pacis, eò quòd Cancellaria, & aliæ curiæ Regis fuerunt tunc apertæ, in quibus lex fiebat unicuique, prout fieri conſuevit, quòd contra cartam de libertatibus cum dictus Thomas fuit unus Parium & Magnatum Regni non impriſonetur, &c.

Nec

Nec dictus Rex ſuper eum ibit, nec ſuper eum mittet, niſi per legale judicium Parium ſuorum, &c. tamen tempore pacis abſque arraniamento, ſeu reſponſione, ſeu legali judicio Parium ſuorum, &c. adjudicatus eſt morti.

¶ Within a year and a day.] How this year and day ſhall be accounted, is to be ſeen. If the ſtroke, or poyſon, &c. be given the firſt day of January, the year ſhall end the laſt day of December: for though the ſtroke, or poyſon, &c. were given in the afternoon of the firſt day of January, yet that ſhall be accounted a whole day, for regularly the law maketh no fraction of a day; and the day was added, that there might be a whole year at the leaſt after the ſtroke, or poyſon, &c. for if he die after that time, it cannot be diſcerned, as the law preſumes, whether he died of the ſtroke or poyſon, &c. or of a naturall death; and in caſe of life the rule of law ought to be certain. But ſeeing the year and day in the caſe of murder and homicide, muſt be accounted apres le fait, after the deed, if a man be ſtricken or poyſoned, &c. the firſt of January, and he dieth of that ſtroke or poyſon the firſt day of May, whether ſhall the year and day be accounted after the ſtroke or poyſon given, or after the death? and it ſhall be accounted after the death, for then the man was murdered, and not after the ſtroke or poyſon given, &c. both in the Indictment at the ſuit of the King, and in the Appeal at the ſuit of the party. And ſo it hath been often adjudged contrary to the opinion of Juſtice Stanford. A murderer half a year after the murder is received, and aided by another, this Acceſſory may be indicted or appealed within the year after he became acceſſory, though it be after the year, that the murder was committed, and ſhall be tryed when the Principall is attainted.

If a murder be committed in the day time in a town not incloſed, and the murderer not apprehended, the Townſhip ſhall be amerced, but if incloſed, whether the murder be in the night, or day, the town ſhall be amerced. They that are preſent when any man is ſlain, and doe not their beſt indeavour to apprehend the murderer, or manſlayer ſhal be fined and impriſoned. What judgment a felon attainted ſhall have, and what he ſhall forfeit; See the firſt part of the Inſtitutes. Sect. 747. and here cap Judgement and execution.

* Nota that before the reign of H. 1. the judgement for felony was not always one, but King H. 1. ordained by Parliament, that the judgement for all manner of felonies ſhould be, that the perſon attainted ſhould be hanged by the neck till he be dead, which continueth to this day. See more for murder in the chapter of Monomachia.

See the Statute of Glouceſt. 6 E. 1. ca. 9. 3 H. 7. ca. 1. 3 E. 3. Cor. 303. Lib. 5. fo. 1. in Cleytons caſe.

Lib. 4. fo. 41, 42. in Heydons caſe.

Stanf. Pl. Cor. 63. 26 Aſſ. p. 52.

3 H. 7. c. 1. ſtat. 1. 3 E. 3. Cor. 299. 8 E. 2. Cor. 395. Inter leges regis Edw. cap. 6. Æthelſtani. cap. 1. Edi cap. 6. &c.

* 9 H. 1. Hovanden Anno 1108. Simon Dun. Rad. & Floren. Wigorn. Hollengſh. 45.

I CAP.

CAP. VIII.

Of Homicide.

HOmicidium ex vi termini comprehendeth Petit treason, Murder, and that which is commonly called Manslaughter: for Homicidium est Hominis cædium, and homicidium est hominis occisio ab homine facta. Therefore the right division of Homicide is: That of homicides, or manslaughters, some be voluntary, & of malice forethought; as Petit treason, and murder of another, and murder of himself. Of the two former we have spoken; and of murder of himself we shall speak hereafter. Of manslaughters, some be voluntary, and not of malice forethought: of these some be felony (as shall be shewed hereafter) and some be no felony. Of which, some be in respect of giving back inevitably in defence of himself, upon an assault of revenge: and some without any giving back; as upon the assault of a thief or robber upon a man in his house, or abroad: Some upon the assault of one, that is under custody; as the Sherif, or Gaoler assaulted by his prisoner. Some in respect that he is an officer or minister of justice, without any assault in execution of his office, or lawfull warrant. And Lastly, some Homicides, that be no felony, be neither forethought, nor voluntary; as manslaughter by misadventure, per infortunium, or casu. And some of these, that be no felony, are causes of forfeiture of a mans goods, and some be not: and of these severall branches in their order. And first of murder of a mans self, who commonly is called Felo de se.

3 E.3. Cor.290. 289. 312. Britton cap.7.

Felo de se.

Felo de se is a man, or woman, which being Compos mentis, of sound memory, and of the age of discretion, killeth himself, which being lawfully found by the oath of twelve men, all the goods and chattels of the party so offending are forfeited.

Regula.

Now let us peruse the severall branches of this description, Majus est delictum seipsum occidere, quam alium.

¶ Being compos mentis.] [a] If a man lose his memory by the rage of sickness or infirmity, or otherwise, & kill himself while he is not compos mentis, he is not Felo de se: for, as he cannot commit murder upon another, so in that case he cannot commit murder upon himself. [b] If one during the time that he is non compos mentis give himself a mortall wound, whereof he, when he hath recovered his memory, dieth, he is not Felo de se: because, the stroke which was the cause of his death, was given when he was not Compos mentis: Et actus non facit reum, nisi mens sit rea. If a man give himself a wound, intending to be Felo de se, and dieth not within the year and day after the wound, he is not Felo de se.

a Rot. Claus. 1 E.1. m.7. Rot. Claus. 6 E.1. Alma filia Roberti de Keston. 3 E.3. Cor. 324. Rot. Escheat. Anno 47 E.3. nu. 17. Ricus Algate.

b 8 E.2. Cor. 412. 22 E.3. Cor. 244. Pl. Com. 260.

¶ Of the age of discretion.] Hereof we have spoken before treating of murder.

¶ Kill himself.] [c] And this is often voluntary, and sometime not voluntary. If A. give B. such a stroke, as he felleth him to the ground, B. draweth his knife, and holds it up for his own defence: A. in hast meaning to fall upon B. to kill him, falleth upon the knife of B. whereby he is wounded to death, he is Felo de se: for B. did nothing but that which was lawfull in his own defence.

c 44 E.3. 44. 3 E.3. Cor. 286. & 297.

¶ Lawfully found.] [d] No goods be forfeited, untill it be lawfully found by the oath of twelve men, that he is Felo de se: and this doth belong to the Coroner

d Pl. Com. 360. b.

Coroner ſuper viſum corporis, to inquire thereof: and if it be found before the Coroner ſuper viſum corporis, that he was felo de ſe, [a] the Executors or Adminiſtrators of the dead ſhall have no traverſe thereunto. And this is the reaſon, that no man can preſcribe to have felons goods, becauſe they are not forfeited, untill it be found of Record, that he is Felo de ſe.

[a] Stanf pl.cor. 183.d.

[b] If a man be Felo de ſe, and is caſt into the ſea, or otherwiſe ſo ſecretly hidden, as the Coroner cannot have the view of the body, and by conſequence cannot inquire thereof: In this caſe it may be inquired thereof by the Juſtices of peace of that County; for they have power by their commiſſion to inquire of all felonies. But if it be found before them, the Executors or Adminiſtrators of the dead may have a traverſe thereunto, but not to the indictment taken before the Coroner ſuper viſum corporis, as before is ſaid: and ſo hath it been reſolved. And ſo in the caſe abovelaid may the Kings Bench enquire thereof, if the felony be committed in the County where the Kings Bench ſit, and the executors or adminiſtrators of the dead may traverſe the ſame.

[b] Hil. 37. Eliz. in the Kings Bench by the whole Court, in the caſe of one Laughton of Cheſhire. See 8 E.2.cor. 412. 3 E.3.cor.312. bile. Stanf.pl.cor.184.

¶ Are forfeited.] Albeit [c] Bracton was of opinion, that if a man that was reus alicujus criminis captus ſit pro eodem, utpote pro morte hominis, vel cum furtmaonifeſto, vel quod utlegatus ſit, & metu pœnæ imminentis mortis mortem ſibi conſciverit, hæredem non habebit, quia ſic convincitur felonia prius facta, viz. furtum, mors hominis, vel hujuſmodi, & conſcientiæ metus in reo pro confeſſo habetur. Aliud erit ſi non ſit in crimine deprehenſus, &c. non debet in aliquo caſu exhæredatio fieri, niſi præcedat crimen, propter quod periculum mortis vel membrorum ſuſtineri debet, &c. But the law makes no ſuch diverſity: [d] for Felo de ſe, whatſoever offence he hath committed (whereof he was not in his life time attainted) ſhall forfeit no lands, but his goods and chattels only. [e] And ſo ſaith Britton, En caſe ou home eſt felon de ſoy meſme, ſoient ſes chateux judges nous come chateux de felon, le heritage nequident remaine as heires. For no man can forfeit his land without an attainder by courſe of law.

[c] 8 E.2.cor.416. 44 E.3 44. 22 E.3.cor.259. 3 E.3.cor.301. 3 E.3.3.cor. 362. 5 Mar. Dier. 160. 9 Eliz. Dier 262. Bract lib.3.f.150. Fleta lib.2.c.34.

[d] Pl.com. 261.a. & b. per touts les Juſtices.

[e] Britton, cap.7. Cuſtũ de Norm. cap.21.

[f] A Villain giveth himſelfe a mortall wound, the Lord ſeiſeth his goods, the Villain after dieth of the wound within the year and the day, the goods are forfeit.

[f] Pl.com.260.b.

And herein [g] there is a diverſity between Chattels perſonels in action, and in poſſeſſion: for if a debt be owing to two, unleſſe it be in caſe of two joynt Merchants, and the one is Felo de ſe, he doth forfeit the whole: but otherwiſe it is of goods in poſſeſſion, for there he forfeiteth but his part.

[g] 8 E.4.4. Pl.com.259.b.

A Leaſe [h] is made for years to the husband and wife, the husband drowneth himſelf, the Leaſe is forfeited, as you may reade at large in Plowdens Commentaries.

[h] Pl.com. 260. Dier 2 Mar. 108.

Now let us purſue the branches into which bloody Homicide did ſpend and empty it ſelfe.

¶ Some manſlaughters be voluntary, and not of malice forethought, upon ſome ſudden falling out. Delinquens per iram provocatus puniri debet mitius. And this for diſtinction ſake is called Manſlaughter. There is no difference between murder, & manſlaughter, but that the one is upon malice forethought, and the other upon a ſudden occaſion: and therefore is called Chance-medley. As if two meet together, and ſtriving for the wall the one kill the other, this is manſlaughter and felony. And ſo it is, if they had upon that ſudden occaſion gone into the fields and fought, and the one had killed the other: this (as hath been ſaid) had been but manſlaughter, and no murder; becauſe all that followed, was but a continuance of the firſt ſudden occaſion, and the heat of the blood kindled by ire was never cooled, till the blow was given, & ſic de ſimilibus.

[i] Lib.4.fol.44. Bibithes caſe.

[k] 15 E.3.Cor. 116. 15 Aſſ. p.7. 43 Aſſ. 31. See the ſtat. of Gloc. cap.39. 3 E.3.cor.184. 286. & 297. 305. & 361. See hereafter ca.101. of Judgement and execution. Verb. Of death of a man ſe defendendo.

Manſlaughter [i] is felony, and hereof there may be acceſſories after the fact done: but of murder, there may be acceſſories, as well before, as after the fact.

¶ Some be [k] voluntary, and yet being done upon an inevitable cauſe, are no felony. As if A be aſſaulted by B, and they fight together, and before any mortall blow given A giveth back, untill he commeth unto a hedge, wall, or other ſtrait,

beyond which he cannot paſſe, and then in his own defence, and for ſafeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the Jury that finde, it was done ſe defendendo, ought to finde the ſpeciall matter. [a] And yet ſuch a precious regard the law hath of the life of man, though the cauſe was inevitable, [b] that at the Common law he ſhould have ſuffered death: and though the ſtatute of Glocester ſave his life, yet he ſhall forfeit all his goods and chattels. [c] Hereof there can be no acceſſories, either before or after the fact, becauſe it is not done felleo animo, but upon inevitable neceſſity ſe defendendo. If A aſſault B ſo fiercely and violently, and in ſuch a place, and in ſuch manner, as if B ſhould give back, he ſhould be in danger of his life, he may in this caſe defend himſelfe; and if in that defence he killeth A, it is ſe defendendo, becauſe it is not done felleo animo: for the rule is, when he doth it in his own defence, upon any inevitable cauſe, Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur.

[a] 43 Aſſ. 31. Rot. Parl. 3 R. 2. nu. 18. John Imperials caſe.
[b] 21 E. 3. 17. Gloc. cap. 9. 4 H. 7. 2.
[c] Lib. 4. fo. 44. Bibiths caſe.

¶ Some without any giving back to a wall, &c. or other inevitable cauſe. [d] As if a thiefe offer to rob or murder B either abroad, or in his houſe, and thereupon aſſault him, and B defend himſelf without any giving back, and in his defence killeth the thief, this is no felony; for a man ſhall never give way to a thief, &c. neither ſhall he forfeit any thing. [e] And ſo it is declared by the ſtatute of 24 H. 8. Likewiſe [f] if a priſoner aſſault the Gaoler, the Gaoler is not by law inforced to give back: but if in defence of himſelfe he kill the priſoner, this is no felony.

[d] Bracton. Lib. 5. fo. 91. Semayns caſe. 26 Aſſ. p. 23. 32. 29 Aſſ. p. 23. 3 E. 3. cor. 305. & 330. 22 E. 3. cor. 261. 21 H. 7. 39.
[e] 24 H. 8. cap. 5.
[f] 22 Aſſ. p. 55.

[g] So if any Officer, or Miniſter of juſtice, that hath lawfull warrant, and the party aſſault the Officer or Miniſter of Juſtice, he is not bound by law to give back, but to carry him away: and if in execution of his office he cannot otherwiſe avoid it, but in ſtriving kill him, it is no felony. And in that caſe the Officer or Miniſter of juſtice ſhall forfeit nothing, but the party ſo aſſaulting or offering to flye away, and is killed, ſhall forfeit his goods and chattels.

[g] 3 E. 3. cor. 290. 22 E. 3. cor. 261. M. 22 E. 3. coram rege Rot. 181. Eborum, Rot. libert. Anno 1 & 2 E. 1. m. 2.

[h] Vicecomes ſeu balivus Domini Regis, qui interficit duos latrones non permittentes ſe juſticiari in ſui defenſionem, & non ex felonia, ſeu malitia, asquietatur.
[h] Paſch. 16 E. 3. Coram rege. Rot. 131. Norff.

[i] If at a Juſt or Turnement, or at the play with Sword and Buckler by the Kings commandement, one doth kill another, this is no felony. [k] In the reigne of King H. 2. it was enacted, that if in ſuch caſe one was ſlaine, it ſhould be no felony, for that in friendly manner they contended to try their ſtrength, and to be able to doe the King ſervice in that kinde, as occaſion ſhould be offered.
[i] 11 H. 7. 22. Vid. hereafter. cap. Againſt riding and going armed.
[k] Mirror cap. 1. § 13. Des adventures.

¶ There is an Homicide, that is neither forethought, nor voluntary. [l] As if a man kill another per infortunium, ſeu caſu, that is Homicide by miſadventure. De amputatore arborum, qui cum ramum projiceret, inſcius occidit tranſeuntem: aut cum quis pilam percuſſerit, &c. ex cujus ictu occiſus eſt, tales de homicidio non tenentur. Homicide by miſadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a mans death.
[l] Bract. lib 3. fo. 136. b. See the ſtat. of Gloc. ca. 9. Marl. cap. 25. Bract. lib. 3. 120. Brit. ca. 7. fo. 15. Fleta lib. 1. ca. 30. Mir. ca. 1. § 9.

¶ Unlawfull.] [m] If the act be unlawfull, it is murder. As if A meaning to ſteale a Deere in the Park of B, ſhooteth at the Deer, and by the glance of the arrow killeth a boy, that is hidden in a buſh: this is murder, for that the act was unlawfull, although A had no intent to hurt the boy, nor knew not of him. But if B the owner of the Park had ſhot at his own Deer, and without any ill intent had killed the Boy by the glance of his arrow, this had been Homicide by miſadventure, and no felony.
[m] Bract. lib. 3. 120. b. Sed erit diſtinguendum utrum quis dederit operam rei licitæ vel illicitæ, &c.

[n] So if one ſhoot at any wild fowle upon a tree, and the arrow killeth any reaſonable creature afar off, without any evill intent in him, this is per infortunium: for it was not unlawfull to ſhoot at the wilde fowle: but if he had ſhot at a Cock or Hen, or any tame fowle of another mans, and the arrow by miſchance had killed a man, this had been murder, for the act was unlawfull.
[n] 3 E. 3. cor. 354. 2 H. 4. 18. 11 H. 7. 23. a.

¶ Without

¶ Without any evil intent.] If a man knowing that many people come in the ſtreet from a Sermon, throw a ſtone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party ſlaine. For the killing of any by miſadventure, or by chance, albeit it be not felony, Quia voluntas in delictis, non exitus ſpectatur; yet he ſhall forfeit therefore all his goods and chattels, to the intent that men ſhould be wary ſo to direct their actions, as they tend not to the effuſion of mans blood, Marlbr. ca. 25.

Nec veniam effuſo ſanguine caſus habet.

Nota, Homicide is called Chancemedley, or Chancemelle, for that it is done by chance (without premeditation) upon a ſudden brawle, ſhuffling, or contention: for meddle or melle (as ſome ſay) is an ancient French word, and ſignifieth brawle, or contention. But I take it that the French word is meſle, which ſignifying ſhuffling, or contending, and by corruption we changing the S to D, doe call it medle, the S being not pronounced, whereof we have made medletum. So as killing of a man by chance-medle, is killing of a man upon a ſudden brawle or contention by chance. For the word [medle or melle,] whereof we have made a Latin word medletum or melletum, ſee Glanvill, lib. 1. cap. 2. Cognoſcere de medletis, de verberibus, de plagis: that is, of brawling, or brabling, of battery, of wounding: the firſt in words, the other two in ſtrokes, &c. in ancient time expreſſed by theſe two Saxon words, viz. Flit, a Flitan, to brawle; & Fiht, which we retaine ſtill to fight when it proceeds to blowes. Unde Flitwit, Flichwite, Fightwite, &c. De Medletis.

And thus much of Homicide committed by man. See in the next Chapter of Deodands, of another kinde of killing of a man.

CAP. IX.

Of Deodands.

DEodands when any [a] moveable thing inanimate, or [b] beaſt animate, doe move to, or cauſe the untimely death of any reaſonable creature by miſchance [c] in any County of the Realm (and not upon the ſea, or upon any ſalt water) without the will, offence, or fault of himſelf, or of any perſon. [d] They being ſo found by lawfull inquiſition of twelve men, being precium ſanguinis, the price of blood, are forfeited to God, that is to the King, Gods Lieutenant on earth, to be diſtributed in workes of charity for the appeaſing of Gods wrath.

And it is to be obſerved, that there is a diverſity, as concerning the Deodand, when the party ſlain is within the age of diſcretion, viz. of 14. years, and when he is above the age of diſcretion. For when he is ſlain by fall from a cart, horſe, mill, &c. and is within the age of diſcretion, there is no Deodand, as it is adjudged [e] in 8 E. 2. tit. Coron. 389. But otherwiſe it is, if an oxe, horſe, bull, or the like doe kill any within the age of diſcretion, there the ſame are Deodands.

And this law concerning Deodands, is grounded upon the law of God, Exodus 2. verſ. 28. Si bos cornu percuſſerit virum, aut mulierem, & mortui fuerint, lapidibus obruetur. See Juſtice Stanford lib. 1. cap 12. which need not here to be recited. If A. killeth a man with the ſword of B. the ſword ſhall be forfeit to

a 8 E. 2. Cor. 403. 8 E. 2. Ibid. 189. A mill wheel. Fleta lib. 1. ca. 25. quicquid mobile fit in molendino. Mirror c. 1. §. 13. 12 R. 2. Cor. 20. a maſſe of earth in a mine.

b Bract. lib. 3. fo. 120. b. A bove, cane, &c.

c Bracton lib. 3. fo. 122 a. Britton fo. 6. 15. Mirror cap. 1. §. 3. Fleta li. 1. ca. 25. 45 E. 3. 2. b. Vide 4. E. 1. Stat. officium coron. 6 E. 6. Dier 77. b. 61. a. Quæ movent ad mortem ſunt Deo danda. *a* Mar. ibid. 107. b. Kelway 21 H. 7. fo. 8.

d Lib. 5. fo. 110. b. Foxleys caſe accord. And this is the reaſon they cannot be claimed by preſcription. 45 E. 3. ubi ſupra. Fleta ubi ſup. *e* 8 E. 2. Cor. 389. *f* Exod. 2. 28.

the

Doct. & Stud. lib. 2. 156. b. Br. Forfeit. 112.

the King as a Deodand, because movet ad mortem, and for default of safe keeping of the same by the owner.

All our ancient Authors ubi supra.

But now that we have cited, and referred you to our books of law already known, and published: let us cast our eye upon some Records of Parliament concerning Deodands, of, or out of ships or other vessels upon Rivers, or waters, fresh or salt, the law being clear, that in aqua dulci there may be Deodands, but in the sea, or in aqua salsa, being any arm of the sea, though it be in the body of the County, there can be no Deodand of the ship, or any part thereof, though any be drowned out of it; because, though the arm of the sea be within the body of the County, the ship or other vessell is subject to such dangers upon the raging waves in respect of the wind and tempest. And this diversity doth notably appear in the Parliament Roll. Amongst the petitions in Parliament it is desired, that if it happen any man, or boy to be drowned by a fall out of any ship, boat, or vessell, they shall be no Deodand. Whereunto the King upon great advice, and conference with his Judges and Councell learned (as always the King doth to petitions in Parliament) made answer, The ship, boat, or vessell being upon * the sea shall be adjudged no Deodand, but being upon a fresh river, it is a Deodand, but the King will shew favour.

Rot. Parl. 51 E. 3. nu. 73.

* The arm of the sea is included herein.

See the like petitions in other Rolls of Parliament Anno 1 R. 2. nu. 106. 4 R. 2. nu. 33. 1 H. 5. nu. 35. &c. but never obtained more, then the Common law gave in these cases.

CAP. X.

Of Buggery, or Sodomy.

25 H. 8. ca. 6. 5 Eliz. ca. 17.

IF any person shall commit buggery with mankind, or beast; by authority of Parliament this offence is adjudged felony without benefit of Clergy. But it is to be known, (that I may observe it once for all) that the statute of 25 H. 8. was repealed by the statute of 1 Mar. whereby all offences made felony or Premunire by any Act of Parliament made since 1 H. 8. were generally repealed, but 25 H. 8. is revived by 5 Eliz.

1 Mar. ubi sup.

Horrendum illud peccatum. 5 El. ca. 17.

Buggery is a detestable, and abominable sin, amongst Christians not to be named, committed by carnall knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.

Rot. Parl. 50. E. 3. nu. 58.

Bugeria is an Italian word, and signifies so much, as is before described, Pæderastes or Paidereستes is a Greek word, Amator puerorum, which is but a Species of Buggery, and it was complained of in Parliament, that the Lumbards had brought into the Realm the shamefull sin of Sodomy, that is not to be named, as there it is said. Our ancient Authors doe conclude, that it deserveth death, ultimum supplicium, though they differ in the manner of the punishment. Britton saith, that Sodomites, and Miscreants shall be burnt, and so were the Sodomites by Almighty God. Fleta saith, Pecorantes & Sodomitæ in terra vivi confodiantur: and therewith agreeth the Mirror, pur le grand abhomination, and in another place, he saith, Sodomie est crime de Majestie, vers le Roy celestre. But (to say it once for all) the judgement in all cases of felony, is, that the person attainted be hanged by the neck, untill he, or she be dead. But in ancient times in that case, the man was hanged, & the woman was drowned, whereof we have seen examples in the reign of R. 1. And this is the meaning of ancient Franchises granted de Furca, & Fossa, of the Gallows, and the Pit, for the hanging upon the one, and drowning in the other, but Fossa is taken away, and Furca remains.

Britton ca. 9. Gen. 19. 9. Rom. ca. 1. 17. F. N. B. 269. a. Fleta li. 1. ca. 35. Mirror ca. 4 §. de Majesty ca. 1. §. 15. & cap. 2. Sect. 11.

Cum

Cùm maſculo non commiſcearis coitu fœmineo, quia abominatio eſt. Cum omni pecore non coibis, nec maculaberis cum eo: Mulier non ſuccumbet jumento, nec miſcebitur ei, quia ſcelus eſt, &c. Levit.18.22,23. 1 Tim.1.10.

The Act of 25 H.8. hath adjudged it felony, and therefore the judgement for felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. He that readeth the Preamble of this Act, ſhall find how neceſſary the reading of our ancient Authors is: The ſtatute doth take away the benefit of Clergy from the Delinquent. But now let us peruſe the words of the ſaid deſcription of Buggery.

¶ Deteſtable and abominable.] Thoſe juſt attributes are found in the Act of 25 H.8.

¶ Amongſt Chriſtians not to be named.] Theſe words are in the uſuall Indictment of this offence, and are in effect in the Parliament Roll of 50 E.3. Ubi ſupra, nu.58.

¶ By carnall knowledge, &c.] The words of the Indictment be, Contra ordinationem Creatoris, et naturæ ordinem, rem habuit veneream, dictúque puerum carnaliter *cognovit, &c. So as there muſt be penetratio, that is, res in re, either with mankind, or with beaſt, but the leaſt penetration maketh it carnall knowledge. [a] See the indictment of Stafford, which was drawn by great adviſe for committing buggery with a boy, for which he was attainted, and hanged.

* This is grounded upon the Word of God, viz. Gen.19.4,5. Judges 19.22. Ut cognoſcamus eos.

a Coke lib.Intr. 352. Mich.5. Ja. Coram rege.

[b] The Sodomites came to this abomination by four means, viz. by pride, exceſſe of diet, idleneſſe, and contempt of the poor. Otioſus nihil cogitat, niſi de ventre & venere. Both the agent and conſentient are felons: and this is conſonant to the law of God. [c] Qui dormierit cum maſculo coitu fœmineo, uterque operatus eſt nefas, et morte moriatur. And this accordeth with the ancient Rule of law, Agentes & conſentientes pari pœna plectentur.

b Ezek.16 49. Gen.18.29. Deut.29.23. Eſay 13.19. Jer.23.14.49.18. 50.4. Luke 17.28,29. 2 Pet.2 6. Jud.verſ.7 Rom.1.26,27. Sapient.10.6,7.

c Levit.20.13. 1 Cor.c.6.v.10.

Emiſſio ſeminis maketh it not Buggery, but is an evidence in caſe of buggery of penetration: and ſo in Rape the words be alſo carnaliter cognovit, and therefore there muſt be penetration; and emiſſio ſeminis without penetration maketh no Rape. Vide in the Chapter of Rape. If the party buggered be within the age of diſcretion, it is no felony in him, but in the agent only. When any offence is felony either by the Common law, or by ſtatute, all Acceſſories both before and after, are incidently included. [d] So if any be preſent, abetting, and aiding any to do the act, though the offence be perſonall, and to be done by one only, as to commit rape, not only he that doth the act is a principall, [e] but alſo they that be preſent, abetting, and aiding the misdoer, are principalls alſo, which is a proof of the other caſe of Sodomy.

d 3 & 4 P.& Mar. Juſtice Daliſons Reports. Stanf.Pl.Cor. Pl.com.97.

e 11 H.4.13. See the 2. part of the Inſtitutes in the expoſition upon the ſtatute of W.1.ca.13. and W.2.ca.34.

¶ Or by woman.] This is within the Purview of this Act of 25 H.8. For the words be, if any perſon, &c. which extend as well to a woman, as to a man, and therefore if ſhe commit buggery with a beaſt, ſhe is a perſon that commits buggery with a beaſt, to which end this word [perſon] was uſed. And the rather, for that ſomewhat before the making of this Act, a great Lady had committed buggery with a Baboon, and conceived by it, &c.

There be four ſins in holy Scripture called Clamantia peccata, crying ſins, whereof this deteſtable ſin is one, expreſſed in this Diſtichon.

Sunt vox c'amorum, vox ſanguinis, et Sodomorum,
Vox oppreſſorum, merces detenta laborum.

CAP.

CAP. XI.

Of Rape.

Deut. 22. 25. Inter leges Alvered i cap. 25. Canuti 49, 50. See W. 2. c. 34. W. 1. ca. 13. Rot. Parl. 8 E. 2. & Rot. Clauſ. 8 E. 2. m. 3. Quia in caſu quando aliquis, &c. 6 R. 2. ca. 6. 18 Eliz. cap. 6. Lib. 11. fo. 39. Alexander Poulters caſe. See the 1. part of the Inſtitutes. Sect. 190. Mich. 19 E. 3. Coram rege Rot. 159. London quod ipſam de puellagio ſuo felonicè & toraliter defloravit. 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b.

RApe is felony by the Common law, declared by Parliament for the unlawfull and carnall knowledge and abuſe of any woman above the age of ten years againſt her will, or of a woman child under the age of ten years with her will, or againſt her will, and the offender ſhall not have the benefit of Clergy.

What offence this was at the the Common law, and what Acts of Parliament have been enacted concerning the ſame; See in the Second part of the Inſtitutes in the expoſition upon the ſtatute of W. 1. ca. 13. and W. 2. ca. 34. and the Firſt part of the Inſtitutes, Sect. 190. 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b.

[a] The doubt that was made in 14 Eliz. at what age a woman child might be raviſhed, was the cauſe of the making of the [b] Act of 18 Eliz. ca. 6. for plain declaration of the law. [That if any perſon ſhould unlawfully know and abuſe any woman-child under the age of ten years, every ſuch unlawfull & carnal knowledge ſhould be felony, and the offender therein being duly convicted, ſhall ſuffer as a felon without allowance of Clergy.]

[c] Although there be emiſſio ſeminis, yet if there be no penetration, that is, res in re, it is no rape, for the words of the Indictment be, carnaliter cognovit, &c.

[d] In the Parliament Rolls we read what deteſtation hath been had of this hainous offence. At the petition of Iſabell late the wife of John Botiler of Beauſe in the County of Lancaſter Knight, which Iſabell one William Pull of Wirrall in the County of Cheſter Gent. ſhamefully did raviſh. It is enacted by Authority of Parliament, that if William Pull doe not yeeld himſelf after proclamation made againſt him, that he ſhall be taken as a Traitor attainted. [e] The ſame Iſabell by another petition ſhewed, how the ſaid William by dures & menace of impriſonment inforced her to marry him, and by colour thereof raviſhed her, for the which ſhe prayeth her Appeal, which to her is granted.

[f] Margaret late the wife of Sir Thomas Malefaut Knight, made the like complaint againſt one Lewis Leyſon, alias Gethey a Welchman. Againſt whom the like order is taken, as was for the ſaid Iſabell: onely where the Rape was committed in Wales, it is enacted, that the ſame ſhall be tried in Somerſetſhire.

[g] Upon complaint of Henry Beamont ſon and heir of Sir Henry Beamont Knight, and Charles Vowell Eſquire, &c. againſt one Edward Lancaſter of Skipton in Craven Eſquire, for taking away Dame Joan Beamont the late wife of the ſaid Sir Henry, being lawfully married to the ſaid Charles, and for that the ſaid Edward married the ſaid Dame Joan againſt her will, and raviſhed her. Againſt Edward Lancaſter and others, remedy is given by appeal, and further [h] upon occaſions happening thereupon, the ſtatute of 31 H. 6. was made, which giveth remedy to a woman enforced to be bound by ſtatute or obligation, as by the Act it appeareth.

a Di. 14 El. f. 304.
b 18 El. ca. 6.
c See before in the next preceding chapter of Buggery.
d Rot. Parl. 15 H. 6. nu. 14.
e In the ſame Roll nu. 15.
f Rot. Parl. 18 H. 6. nu. 28.
g Rot. Parl. 31 H. 6. nu. 72.
h 31 H. 6. ca. 9.

It is read in ſtory, that chaſt Lucretia being raviſhed, ſhe was found in extream heavineſſe, and it was demanded of her, Salvan' ? ſhe anſwered, Quomodo mulier ſalva eſſe poteſt læſa pudicitia? And yet thereof it is truly ſaid, Duo fuerunt, & unus commiſit adulterium.

Gen. 34.

In the holy Hiſtory you ſhall read, Dinam cum vidiſſet Sichem filius Hemor Hevei princeps terræ illius, adamavit & rapuit, &c. Obſerve well what followed thereupon. Likewiſe Ammon prævalens viribus ſuis oppreſſit Thamar ſororem ſuam, & eubavit cum ea, &c. quæ aſpergens cinerem capiti ſuo, ſciſſa talari tunica, impoſitis manibus ſuper caput ſuum ibat ingrediens & clamans, &c. And obſerve alſo the end of the offender.

2 Sam. 13. 14. 19.

CAP.

CAP. XII.

Felony for carying away a woman againſt her will, &c.

WE have thought good next after Buggery and Rape, to ſpeak of the ſtealing of women, becauſe the * Apoſtle doth rank after the Sodomite, him that is Plagiarius, ſo called, becauſe Lege Flavia plagis damnaretur. And we will begin with the ſtatute of 3 H.7.cap.2. Exod.21.16. Deut.24.7. * 1 Tim.1.10.

Where women, as well maidens, as widows and wives, having ſubſtances, ſome in goods moveable, and ſome in lands and tenements, and ſome being heirs apparant unto their Anceſtors, for the lucre of ſuch ſubſtances, been oftentimes taken by miſdoers, contrary to their will, and after married to ſuch miſdoers, or to other by their aſſent, or defoyled, to the great diſpleaſure of God, and contrary to the Kings Laws, and diſparagement of the ſaid women, and utter heavineſſe, and diſcomfort of their friends, and to the evill enſample of all other: It is therefore ordained, eſtabliſhed, and enacted by our Soveraign Lord the King, by the advice of the Lords Spirituall and Temporall, and the Commons in the ſaid Parliament aſſembled, and by authority of the ſame, That what perſon or perſons from henceforth that taketh any woman ſo againſt her will unlawfully, that is to ſay, maid, widow, or wife, that ſuch taking, procuring, and abetting to the ſame, and alſo receiving wittingly the ſame woman ſo taken againſt her will, and knowing the ſame, be felony. And that ſuch miſdoers, takers, and procurators to the ſame, and receytors, knowing the ſaid offence in form aforeſaid, be henceforth reputed and judged as principall felons. Provided alway that this Act extend not to any perſon taking any woman, only claiming her as his Ward, or bondwoman. 3 H.7.c.2. 39 El.cap.9.

This Act on the offenders part doth extend to all degrees, and to all perſons, but extendeth not to all women: For on the womans part Four things are neceſſarily required to make the offence felony. Firſt, that the maid, wife, or widow have lands or tenements, or moveable goods, or be an heir apparant. Secondly, that ſhe be taken away againſt her will. Thirdly, that ſhe be married to the misdoer, or to ſome other by his conſent, or be defiled, (that is, carnally known) For if theſe concurre not, the misdoer is no felon within this ſtatute, but otherwiſe to be puniſhed. And ſo it was reſolved, 3 & 4 Ph. & Mar. And after reſolved by all the Judges of England upon adviſed conſideration of this Act of 3 H.7. and upon conſultation, and conference between them, as the Lord Dier hath reported under his own hand, which I have ſeen, but the report thereof is omitted in the print; and the Indictments grounded upon this ſtatute, are according to this reſolution. Fourthly, that ſhe be not ward, or bondwoman to the perſon that taketh her, or cauſeth her to be taken only as his ward, or bondwoman. 3 & 4 Ph. & Mar. Juſtice Daliſons report. Mich. 26 Eliz. Dier Manuſcript And ſo reſolved by Parliament in Anno 39 El. cap.9.

By this Act, not only the takers, but the procurers, abetters of the felony, and receivers of the ſaid woman wittingly, knowing the ſame, be all adjudged as principall felons: the like whereof we finde not in any other ſtatute, that we remember. But by a conſtruction of the Common law, they that receive the miſ- Note, quia raro.

doers, and not the woman, are accessories; for this Act maketh the receivers of the woman, &c. principals.

39 Eliz. cap. 2. Kelway 81. b. Stanf. Pl. cor. 37. b.

For the odiousnesse of this offence, the benefit of Clergie is taken away from all the offenders against the said Act. Vid. Kelway, & Stanford.

4 & 5. Ph. & Mar. cap. 8. Hil. 34. Eliz. lib. 3. fo. 37. Ratcliffes case.

See a good and profitable statute made for such as take away Maidens or women children, &c. within the age of sixteene yeares (though it be not against their will) without consent of parents, &c. and a penalty imposed for deflowring, or contracting matrimony with such maids or women-children; and further, the forfeiture which such maid or woman-childe undergoe, which consent to such contract, &c. But because we are now to speak of felonies, whereunto that Act extends not, we refer the Reader to the statute it selfe. Only we will adde a case which we finde in the Parliament Roll.

Rot. Parl. 2 R. 2. nu. 34.

The Lady Nevill of Esser complained in Parliament, that John Brewse and others brake her house at London, and violently took thereout Margerie the Daughter of John Nierford her Sonne (by her first husband) and carried the said Margerie away to the house of Sir Robert Howard Knight; and they kept away the said Margerie, to the end she should not pursue in Court Christian, for the adnullation of a contract of matrimony, against the said John Brewse. This was holden so great an offence, as the said Sir Robert was committed by the Lords to the Tower of London, and he after found surety, and promised to doe his uttermost to bring forth the said Margery by a day prefixed, or else to yeild himselfe prisoner to the Tower againe: but it seems the maid was restored to her mother againe, &c. for I finde no further prosecution of that cause. See hereafter cap. 45. in fine. 43 Eliz. cap. 13.

CAP. XIII.

Of Felonie for cutting out of Tongues, and putting out of Eyes, &c.

5 H. 4. ca. 5.

IF any man doe cut out the tongue, or put out the eyes of any of the Kings Lieges, of malice prepensed; it is felony. The mischiefe before this statute was, that when one had been beaten, wounded, maimed, or robbed, &c. the misdoers, to the end that the party grieved might not be able to accuse them, did cut out their tongues, or put out their eyes, pretending the same to be no felony: and therefore it is ordained and established to be felony by this Act.

Here it is to be observed, that where it doth appear by the preamble of this law, that this offence had been before this Act daily done: this law did so terrifie offenders, as we remember not, that we have read in any Book or Record, any to be indicted, &c. upon this law, above one at the most. And of all statutes these are to be preferred, which prevent offences before they be done, before those which punish them after they be done. And therefore in the making of this law there was salutaris severitas, & beata securitas.

¶ Malice prepensed.] that is, voluntary and of set purpose, though it be done upon a sudden occasion: for if it be voluntary, the law implyeth malice.

Bract. lib. 3. fo. 144. b.

We read in Bracton, that the cutting off of a mans privie members was felony by the Common law: for he saith, Quid dicitur si quis alterius virilia absciderit, & illum libidinis causa vel convitii castraverit? tenetur sive hoc volens fecerit, vel invitus, & sequitur pœna aliquando capitalis, aliquando perpetuum exilium cum omni bonorum ademptione. And agreeable thereunto, I finde a Record in Bractons time to this effect; Henricus Hall & A. uxor ejus capti & detenti sunt in prisona de Evilchester, eò quòd rectati fuerunt quòd ipsi absciderunt

Rot. Claus. Anno 13 H. 3. m. 9.

virilia

virilia Johannis Monachi, quem idem Henricus deprehendit cum prædicta A. uxore ejus, &c. Fleta ſaith, Si quis caſtratus fuerit, talis pro mahemiato poterit adjudicari. And therewith agreeth old Juſtice Sennall in the Mirror; and ſo is the Law holden at this day. And in the Appeale and Indictment of Mayhem it is ſaid, Felonicè Mayhemavit: whereof we ſhall ſpeak more hereafter in his proper place. Cutting off of Eares is no felony, as it appeareth by the ſtatute of 37 H. 8. Vid. Stanf. Pl. Cor. 27. a. The offender ſhall have the benefit of his Clergie.

Fleta lib. 1. ca. 38. Mir. ca. 1. § 9. De homicidio. See hereafter ca. 53. of Mayhem 37 H. 8. cap. 6. Mir. cap. 4. De Artic. de Eire.

CAP. XIV.

Of Burglarie.

A Burglar (or the perſon that committeth Burglary) is by the Common law a felon, that in the night breaketh and entreth into a manſion houſe of another, of intent to kill ſome reaſonable creature, or to commit ſome other felony within the ſame, whether his felonious intent be executed or not. We call it in Latin Burglaria: and in Statuto de officio Coronat. the offenders are called Raptores domorum.

a Inter leg. Edm. cap. 6 fo. 76. 22 Deut. 2.

This word [b] Burglar, is derived of theſe two words, viz. Burgh, ſignifying an houſe, and Laron ſignifying a thief, as it were an houſe-thiefe. [c] The Saxons called it hurbpec, inter ſcelera inexpiabilia. And aptly was it derived from Latro: for,

[d] Ut jugulent homines, ſurgunt de nocte latrones.

[e] Britton calleth him a Burgeſſor. Then let us peruſe the branches of this deſcription.

b Lib. 4. fo. 39. Broks caſe.
c Inter leges Canuti fo. 118. cap. 61. Lamb.
d Horace lib. 1. Epiſt.
e Britton fo. 17.

¶ In the night.] [f] The word in the Indictment or Appeale, is, noctanter, id eſt, noctu. The naturall day is divided in lucem, light, which is dies ſolaris, and in tenebras, which is night. [g] And therefore as long as the day-light continues, whereby a mans countenance may be diſcerned, it is called day: and when darkneſſe comes and day-light is paſt, ſo as by the light of day you cannot diſcerne the countenance of a man, then it is called night. [h] Poſuiſti tenebras, & facta eſt nox, in qua pertranſeunt beſtiæ ſilvæ; ſol oritur & congregatæ ſunt, exit homo ad opus & operationem ſuam, & redit veſpere. This doth aggravate the offence, ſith the night is the time wherein Man is to reſt, and wherein Beaſts runne about ſeeking their prey.

f 4 E. 6. Br. Cor. 185. Stanf. Pl. Cor. fo. 30.
g 3 E. 3. cor. 193.
h Pſal. 164. Lib. 7. fo. 6. b. Milborns caſe.

In ancient Records Crepuſculum was ſignified, when it was ſaid, Inter Canem & Lupum: for when the night begins, the Dog ſleeps, and the Wolf ſeeks his prey. For ſo we finde the entry oftentimes in the raigne of E. 1. as taking one example for many. [i] Margeria filia Nicolai de Okele appellat Johannem Choſe pro Raptu, & pace regis fracta, die Martis, &c. inter Canem & Lupum, id eſt, inter diem & noctem, vel in crepuſculo, Anglicè Twylight.

[k] In placito de domo combuſta malitioſè hora veſpertina, ſcilicet inter Canem & Lupum venerunt malefactores, A, B, &c.

[l] Ignitegium, à tegendo ignem, it *Coverle fue*, hora octava poſt meridiem.

[m] Bracton ſaith, Si quis furem nocturnum occiderit, ita demum impune foret, ſi parcere ei ſine periculo ſuo non potuit; ſi autem potuit, aliter erit, in manibus enim regis ſunt vita & mors hominum, ſicut coram Rege apud Windeſore de quodam homine de Cocham, coram Gulielmo de Ralegh tunc Juſticiario, cui Dominus Rex in tali caſu perdonavit mortem. Agreeable hereunto was the law of the twelve Tables, Si noctu furtum factum ſit, jure cæſus eſt.

i Tr. 7 E. 1. coram rege, Rot. 12. Gloc.
k Placita coróne apud novum caſtrum, Anno 24 E. 1. Rot. 6. in dorſo.
l Hil. 3. R. 2. coram rege Rot. 8. London. John Imperials caſe. Bract. lib. 3. fo. 144. b. Pardon.

1 Mar. Dier 99.

¶ Break and enter.] The words of the Indictment be, Fregit & intravit: and this is understood of an actuall breaking of the house, and not of a breaking in law: for every entry into the house by a trespasser, is a breaking in law: but in case of a Burglary, every entry is not a breaking of the house, for the words of the Indictment be, Felonicè & burglariter fregit, &c. As if the doore of a Mansion house stand open, and the theefe enter into the house with a purpose to steale, this is a breaking of the house in law, and yet no Burglary, because there must be an actuall breaking. So it is if the window of the house be open, and a theefe with a Hook or other engine draweth out some of the goods of the owner: this is no Burglary, because there is no actuall breaking of the house. But if the theefe breaketh the glasse of the window, and with a Hook or other engine draweth out some of the goods of the owner, this is Burglary, for there was an actuall breaking of the house. It is deemed an Entry, when the theefe breaketh the house, and his body, or any part thereof, as his foot, or his arme, is within any part of the house: or when he putteth a Gun into a window which he hath broken, or into an hole of the house which he hath made, of intent to murder or kill; or as hath been said, a Hook or other engine into any part of the house which he hath broken, of intent to steale: this being put by him into the house, is an Entry and breaking of the house. But if he doth barely break the house without any such Entry at all, that is no Burglary, for it must be fregit & intravit.

Stanf. Pl. Cor. 30. a. Dier 1 Mar. 99. a. 22 Ass. p. 39. 95. * 13 H. 4. 13.

* If divers come in the night to do a Burglary, and one of them break & enter, the rest of them standing neere to the doore, or about other parts of the house, or at a Lanes end, or some Orchard gate, or Field gate, or the like, to watch that no help shall come to defend & aide the owner or dweller; this is Burglary in all.

That which is done in fraudem legis, the law giveth no benefit thereof to the party. As if Thieves come in the night with Hue & Cry, pretending that they be robbed, and shall require the Constable to search for the felons, and whilest he goeth with them into some mans house, they binde and rob the Constable, and dweller, this is Burglary; for in judgement of law it is their act.

¶ Into a Mansion-house.] The Indictment saith, Domus mansionalis, a mansion or dwelling house.

a 2 E. 6. Br. Cor. 180. Britton fo. 17.

a Domus mansionalis is divided into two branches, viz. to Inset Edifices, as Hall, Parler, Buttry, Kitching, and Lodging-chambers, &c. and the Outset buildings, as Barnes, Stables, Cowhouses, Dairies, &c. all these are parcels of the Mansion-house, and will passe by the name of Domus mansionalis. And albeit every Mansion-house hath not all these buildings, yet every house for the dwelling and habitation of man is taken to be a Mansion-house, wherein burglary may be committed.

b Lib. 4. fo. 40. in Brocks case. Hil. 38 Eliz. per les Justices, ibid.

b If a man hath a Mansion-house, and upon some accident he and all his family some part of the night are out of the house, and in the mean time a thief break and enter into the house, of intent to steale; this is Burglary, although neither the owner nor any of his family is in the house: for the Indictment of Burglary is, Domum mansionalem, &c. fregit, &c. and this is Domus mansionalis. c See hereafter the statutes of 23 H. 8. and 5 E. 6.

c 23 H. 8. cap. 1. 5 E. 6. cap. 9. See *Inter leges Alveredi*. c. 6.

d Britton. fo. 17. Dier, 1 Mar. 99. 22 E. 3. tit. cor. 264. 22 Ass. p. 95. 26 Ass. 19.

d If a man do break and enter a Church in the night, of intent to steale, &c. this is Burglary, for Ecclesia est domus mansionalis omnipotentis Dei. e Frustra legis auxilium invocat, qui in legem committit. f Domus mea domus orationis vocabitur, vos autem fecistis illam speluncam latronum. Sacrilegium derivatur à sacro & legere, id est, furari.

e 27 Ass. 42. 20 E. 2. Cor. 283. 12 E. 3. Cor. 1:0. Rot. clauf. 3 E. 3. m. 2. & 18. the Ordinary may allow Clergy for Sacriledge. Lib. 11. fo. 29.

f Matth. 21. 23.

A Tent or Booth in Fair or Market, is not Domus mansionalis, but of another name or kind; g but that is provided for by the statute of 5 E. 6. cap. 9. whether the Robbery be done in the night, or in the day, the owner, &c. being within the same, sleeping or waking. But a shop wherein any person doth converse being parcell of a Mansion-house, or not parcell, is taken for a Mansion-house.

g 5 E. 6. cap. 9.

Likewise

Likewiſe a Chamber or room, be it upper or lower, wherein any perſon doth inhabit or dwell, is Domus manſionalis, in law.

Our ancient Authors and old Records did expreſſe Burglary under this word, Hamſuckne, or Hamſokne. The firſt is derived from two Saxon words, viz. of Ham, that ſignifieth a Manſion-houſe, Domus manſionalis, which to this day we call our Home: and Sucken or Succen, that is, Seeken, as much to ſay, as to ſeek a man in his houſe to ſlay or rob him.

It is to be noted that our ancient Authors, nor our old Book-caſes do diſtinguiſh between the day and the night, when the offence ſhould be committed in the houſe, ſave only the Mirror.

Si quis Hamſockne, quæ dicitur invaſio domus contra pacem Domini Regis in domo ſua ſe defenderit, & invaſor occiſus eſt, imperſecutus & inultus remanebit, ſi ille quem invaſit aliter ſe defendere non potuit: dicitur enim quòd non eſt dignus habere pacem, qui non vult obſervare eam. And the Mirror ſaith, Hamſokne de auncient ordinance eſt peche mortel, car droit eſt que cheſcun eyt quiet en ſon hoſtel, q̃ a la ley eſt. Bracton lib. 3. fo. 144. b. Britton fo. 33. Statut. Walliæ, fo. 6. ter. de Snodon. Mirr. cap. 1. § 11. de Hamſockne.

Others derive Hamſokne from Ham, which of both ſides is confeſſed to be a Manſion-houſe, and Sockne which ſignifies a Court, as much to ſay, as to have juriſdiction, or to hold plea of offences done to a man in his houſe. Expoſit. vocab. inter ſtatuta. Fleta lib. 1. ca. 42.

One was indicted, Quòd clauſum I.S. fregit, &c. ad ipſum interficiendum. This is not felony without an act done, though it were noctanter: for the Appeale and Indictment of Burglary is Quòd domum manſionalem, &c. fregit & intravit. So as neither cloſe nor any other place, but the Manſion-houſe only is required to make burglary. But burglary may be committed as well in the outſet buildings, as in the inſet, for all are parts of the Manſion-houſe, and he that breaketh any of the outſet buildings doth break Domum manſionalem, as well as he that breaks the inſet. 13 H. 4 fol 7. tit. Cor. 229.

¶ Of intent to kill.] If a man be indicted, that he in the night time did feloniouſly break the houſe of I. S. ad verberandum ipſum I. S. this is no burglary, becauſe it was but to beat, and not to kill. But if it were ad interficiendum I. S. then it is burglary, though he never touched him; for the intent muſt be to commit felony, and not treſpaſſe, or other thing that is not felony, the words of the Appeale or Indictment being, Quod felonicè & burglariter, fregit, & intravit, &c. ſo as there muſt be a felonious and burglarious intent. 13 H. 4. ubi ſup.

¶ Or to commit ſome other felony.] They be Burglers which break any houſe or Church in the night, although they take away nothing: otherwiſe it is of Robbery, as ſhall be ſaid hereafter. See Stanf. Pl. Cor. 30. b. 22 E. 3 cor. 264. 22 Aſſ. 39. & 95.

The ſtatutes of 23 H. 8. cap. 1. and 5 E. 6. cap. 9. do not define what Burglary is, but take away the benefit of Clergy from certain kindes of Burglary. As when an actuall robbery is done, and when the owner or dweller, &c. is put in fear, &c. or when the owner or dweller, &c. is ſleeping or waking within any place within the precinct of the ſame houſe; theſe circumſtances do aggravate the Burglary: and therefore the makers of thoſe ſtatutes took away the benefit of Clergie not in all caſes of Burglary, but in thoſe particular caſes where a robbery is done, &c. But the ſtatute of 18 Eliz. cap. 6. hath taken away the benefit of Clergie in all caſes of Burglary: and hereby a good and equall proportion is kept in all caſes of this nature. And both Acts of Parliament, and the reſolution of Judges do well agree together, which ſome not well obſerving have publiſhed manifeſt errours, which being in caſe of life are fit to be reformed. 23 H. 8. cap. 1. 5 E. 6. ca. 9. Clergie. 18 Eliz. cap. 6.

If any man ſhall break a houſe by day, and take away thence money or goods to the value of five ſhillings or more, in any part of a dwelling houſe, or outhouſe belonging to the ſame, though no perſon be therein, for this felony he ſhall loſe the benefit of his Clergie, ſo as for this offence the party ſhall ſuffer death, as in caſe of Burglary. 39 Eliz. ca. 15.

CAP.

CAP. XV.

Of burning of houſes.

De Incendiariis inter leges Æthelſtani cap.6. fo.61. Et Canuti cap. 61.fo.118. *Husbærnet* numeratur inter ſcelera inexpiabilia.

HAving now ſpoken of Burglaries,and felonies concerning houſes,there reſteth one other of that kind, wherewith we will conclude this diviſion,and that is,Burners of houſes:which being a felony by the Common law, let us ſee what our ancient Authors, and old Parliaments,and Records have left unto us thereof.

[a] The ancient article of the Eire was,De Incendiariis nocturnis vel diurnis, & combuſtionibus tempore pacis nequiter perpetratis.

[b] Hereof Bracton ſaith, Si quis turbata ſeditione incendium fecerit nequiter & in felonia,vel ob inimicitiam,vel alia de cauſa,capitali ſententia punietur.Nequiter dico, quia incendia fortuita, vel per negligentiam facta, et non mala conſcientia, non ſic puniuntur, quia civiliter agitur contra tales.

[a] Cap.Itineris.
[b] Bract.l.3.146.b.

Britton ſaith, Soit inquiſe de ceux que felonioufment en temps de peace aient auters blees, ou auters meaſons arſes, & ceux que ſerr' de ceo attaint, ſoient arſes, iſſint que ils ſoient punies per meſme le choſe dont ilz pecherent.

Brit. fo. 16.

Fleta ſaith,Si quis ædes alienas nequiter ob inimicitiam,vel prædæ cauſa tempore pacis combuſſerit, & inde convictus fuerit per Appellum, vel ſine, capitali debet ſententia puniri.

Fleta li.1.c.35. De combuſtionibus.

The Mirror, Ardours ſont, que ardent citie, ville, maiſon home, maiſon beaſt, ou auters chateux, de lour felonie en temps de pace pur hame ou vengeance. &c. In Appeal De Arſon. Iſſint Ieo diſe, &c. Que Sebright illonque eſt defamy, &c. de ceo que a tiel jour, &c. en tiel meaſon, * ou biens, miſt le feu,&c. And afterwards en reſpons al arſon. Al Arſon poit il dire, que laventure avient de miſchance,& nient de felony purpenſe.

Mirror ca.1.§.8. De Ardours cap.2.§.11.De Appeal darſon. & §. 12. cap.3.§. Al arſon. * Ou biens.

So hainous was this offence, that in Anno 3 E.1. it was declared by Parliament, Que ceux queux ſont priſes pur arſon felonioufment fait, ne ſoient en aſcun manner repleviſables. Adjudicantur ſuſpendi, qui ex malitia præcogitata combuſſerunt magnam partem de Lynne in Com. Norff.

W.1. ca.15.

Upon diſperſing of Bills, threatning burning of houſes,&c. was made high treaſon, whereof more hereafter: but that Act is repealed by 1 E.6. cap.12. and 1 Mar. Now upon that which hath been ſaid, our purpoſe is to frame a deſcription of this felony, as may alſo be warranted by our Year-books, and the common opinion and experience at this day.

Hil. 7 E.2.Corã rege Rot.24. Norff. 8 H.6.ca.6. See 15 H.6. nu.23.

¶ Burning is a felony at the Common law, committed by any that maliciouſly and voluntarily, in the night or day, burneth the houſe of another.

Now let us peruſe this deſcription, by all his materiall parts.

All the ancient Authors. 3 H.7.10. 11 H.7.1. 23 H.8.ca.1. 25 H.8.ca.3. 5 & 6 E.6.ca.9. 4 & 5 Ph.& Mar. cap.4. Lib 11. fo.35. Alexander Poulters caſe. 3 H.7.ubi ſupra

¶ Burning.] Putting of fire into any part of a houſe, whereby that part burneth. For it is neceſſary, that there be a burning, but it is not neceſſary, that all or any part be wholly burnt, nor that the fire hath any continuance, but the intent only ſufficeth not. As if one put fire into any part of a houſe, and it burneth not, this is no felony, for the words of the Indictment be, Incendit, & combuſſit. Again, if it doth burn, though it goeth out of it ſelf, it is felony.

¶ By the Common law.] This is proved by all the ancient Authors, Acts of Parliament, and books aforeſaid. And the reaſon thereof is, for that burning of houſes being an hoſtile action, is preſumed in Law to be done maliciouſly for revenge, and as an enemy, to conſume the ſame by fire in time of peace

peace. It was made in ſpeciall manner high treaſon, (as before is ſaid) viz. if any threatned by caſting of Bils, to burn an houſe, if money be not laid in a certain place, and after did burn the houſe: but this treaſon is repealed by 1 E. 6. ca. 12. and 1 Mar. but yet the felony remaineth ſtill; for In proditione (as hath been ſaid) implicatur felonia. 8 H 6. ca. 6. 3 H. 7. 10 Per Brian. High Treaſon. Nota.

¶ Maliciouſly and voluntarily.] Proved alſo by the words of the Indictment, which be, Voluntariè, ex malitia ſua præcogitata, & felonicè. For if it be done by miſchance, or negligence, it is is no felony, as before it appeareth.

The Law doth ſometime imply, that the houſe was burnt maliciouſly & voluntarily. As if one intend to burn the houſe of A. only, and not the houſe of B. and yet in burning the houſe of A. the houſe of B. is burnt; in this caſe the burning of the houſe of B. is felony, becauſe it proceeded of the malicious and voluntary burning of the houſe of A. and the event ſhall be coupled to the cauſe, which was voluntary, and malicious: and therefore in the Indictment for the burning of the houſe of B. it ſhall be ſaid, Voluntariè ex malitia ſua præcogitata, & felonicè, &c. Pl. Com. fo. 475.

¶ The houſe of another.] This is not only intended of Inſet houſes, parcell of the manſion houſe, but to the Outſet alſo, as Barn, ſtable, Cow-houſe, Sheephouſe, Dairy houſe, Milkhouſe, and the like, parcell of the manſion houſe: but burning of a Barn, being no parcell of a manſion houſe, is no felony: and yet if there be Corn or Hay within it, the burning thereof is felony, though the Barn be not part of a manſion houſe.* But the offender is not outted of his Clergy, but where he burns ſome part of a Manſion houſe, or a Barn with Corn. Tr. 44 Eliz. Coram rege. Ro. fo. 229. Lib. Int. Coke fo. 25. b. Lib. 4. fo. 20. Barhams caſe. * Pl. Com. 475.

Note the ancient Authors extended this felony, further then houſes, viz. to ſtacks of Corn, Wayns or Carts of Cole, Wood or other goods. And it is ſaid in 3 H. 7. ubi ſupra, Certum eſt quòd crematio domorum feloniceè fuit felonia per communem legem. 3 & 4 E. 6. c. 5.

The attempt to burn a ſtack of Corn, was made felony by the ſtatute of 3 & 4 E. 6. but this is repealed by 1 Mariæ.

Burning of the frame of a houſe, was made felony by the ſtatute of 37 H. 8. becauſe the frame of a houſe is no houſe: but that is repealed by 1 E. 6. ca. 12, & 1 Mariæ. 37 H. 8. ca. 6.

43 El. ca. 13. It is felony if any within the Counties of Cumberland, Northumberland, Weſtmerland, or the B. of Dureſme wilfully, and of malice burn or cauſe to be burnt any barn or ſtack of corn or grain, without benefit of Clergy. 43 El. ca. 13.

Note a diverſity between the Indictment of Burglary and Burning; for the Indictment of Burglary, muſt ſay (as hath been ſaid) domum manſionalem, but ſo need not the Indictment of Burning, but domum, viz. a Barn, &c. Malthouſe, or the like. Bract. lib. 3 fo. 146. b.

CAP.

CAP. XVI.

Of Robbery.

See the 1. part of the Institutes. Sect. 501. Custum, de Norm. cap. 71.

Robbery is a felony by the Common law, committed by a violent assault, upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever. [a] See Inter leges Canuti, Apertæ compilationes numerantur inter scelera hominum inexpiabilia,

[a] Int. leges Canu. cap. 61. fo. 118. Lamb.

¶ Robbery.] [b] It is derived de la Robe, both because in ancient times (as sometime yet is done) they bereave the true man of some of his robes or garments, and also for that his money or other goods are taken from his person, that is, from or out of some part of his garment, or robe about his person. And is ranked in this place, for that it concerneth not only the goods, but the person of the owner. We call it, Roberia & rapina, and the the theef Raptor. Whereof Bracton saith, Est enim quasi furtum rapinæ, quæ idem est, quantum ad nos, quod roberia, & est genus contrectationis contra voluntatem domini, & similis pœna sequitur utrunque delictum, unde prædo dicitur fur improbus: quis enim magis contrectat rem alienam invito domino, quam ille qui rapit?

[b] Bracton lib. 3. fo. 150. b. Britton fo. 22. Fleta lib. 1. ca. 37. Mirror cap. 1. §. 10.

¶ Felony by the Common law.] This is agreed of, of all, both ancient and late, without any question. And it is deemed in law to be amongst the most hainous felonies, Crimen improbissimum.

Britton & Fleta Ubi supra. 14 E. 3. cor. 115.

¶ Violent Assault.] This agreeth with the Indictment, Violenter & felonicè cepit, &c.

Bract. li. 3. fo. 150. b.

¶ By putting him in fear.] This agreeth also with the Indictment: and this circumstance maketh the difference between a Robber and a Cutpurse: both take it from the person, but this takes it, clam & secretè without assault or putting in fear, and the Robber by violent assault, and putting in fear. If one cut a purse, with money in it above twelve pence, he shall be hanged, and the benefit of Clergy is taken from him. But of ancient time the punishment was otherwise. S. caprus in London cum bursa quam scidit cum tribus solidis, & hoc non potuit dedicere, & ideo amittat dextrum pollicem. Britton saith, Des cinsors des burses, voylons que celuy que la burse coupa, si auter mavieſe ne eyt fait, eyt judgement de Pillory; & silz eyent emble auter choſe meinder de 12 deniers, perdent un oraile, & si le choſe paſſe 12 deniers, eyent judgment de mort.

10 H. 3. Cor. 434. Britton fo. 24. b.

¶ By taking.] The words of the Indictment be, Violenter & felonicè cepit. Hic opus est interprete. For it must be understood, that there is an actuall taking in deed, and a taking in law, and that may be, when a thief receiveth, &c. For example: If thieves rob a true man, and find but little about him, take it, this is an actuall taking; & by menace of death, compell him to swear upon a book to fetch them a greater sum, which he doth, and deliver it unto them, which they receive, this is a taking in law by them, and adjudged Robbery: for fear made him to take the oath, and the oath, and fear continuing, made him bring the money, which amounteth to a taking in law, and in this case there need no speciall Indictment, but the generall Indictment, (quòd violenter & felonicè cepit,) is sufficient. And so it is, if at the first, the true man for fear deliver his purse, &c. to the thief.

44 E. 3. 14. 4 H. 4. 2.

This

This word [cepit] neceſſarily implieth, that the thief muſt be in poſſeſſion of the thing ſtoln: For example, If the bag or purſe of the true man be faſtned to his girdle, &c. and the thief the more eaſily to take the bag or purſe, doe cut the girdle, whereby the bag or purſe falleth to the ground, this is no taking, for the thief had never any poſſeſſion thereof, & ſic de ſimilibus: but if the thief had taken up the bag, or purſe, and in ſtriving had let it fall, and never took it again, this had been a taking, becauſe he had it in his poſſeſſion; for the continuance of his poſſeſſion is not required by law.

¶ From his perſon.] The words of the Indictment be, à perſona, &c. If the true man ſeeking to eſcape, for the ſafeguard of his mony, caſt it into a buſh, which the thief perceiving, takes it; this is a taking in Law from the perſon, becauſe it is done at one time. If the true man had caſt off his ſurcote, or other uppermoſt garment, and the ſame lying in his preſence, a thief aſſault him, &c. and take the ſurcote, this is robbery; for that which is taken in his preſence, is in law taken from his perſon: And ſo it is of the horſe of a true man, which ſtands by him, Et ſic de ſimilibus. 14 E.3.Cor.115.

In ancient Authors and Records, in Pleas of the Crown, you ſhall read of Sakebere, &c. whom we will derive and explain. Sakebere, Sacbere, or Sacburgh, Sac, or Sak is an ancient French word, and ſignifieth a bag, purſe, or powch. So that Sackbere is he that did bear the bag, &c. and in legall underſtanding, is he that was robbed of his mony in his bag. And this agreeth with the interpretation thereof by Bracton, viz. Furtū verò manifeſtū eſt, ubi latro deprehenſus eſt ſeiſitus de aliquo latrocinio, viz. Handhabende, & Bacberende, & inſecutus fuerit per aliquē cujus res illa fuerit, qui dicitur Sacaburth. And herewith agreeth Fleta lib. 1. c.42.§.Sunt autem, &c. And Britton fo.22.b.& 72.b. agreeth herewith, and calleth him Sakebere; and ſo doth Juſtice Stanford, Pl. cor.fo.28. term him, which (as we take it) is his right name derived of theſe two words, Sac and bere, that is, he that did bear the bag, &c. Bract.lib.3.fol. 150.b. Fleta l.1.ca.42. Britton fo.22.b. & 72.b. Stanf.fo.28.

¶ Of what value ſoever.] Though it be under the value of twelve pence, that is taken, (as to the value of a penny or two pence) it is robbery, but ſomewhat muſt be taken; for the aſſault only to rob without taking ſome money or goods is no felony, & ſuch opinions, as ſeem to the contrary, were maintained by that, which then was anciently holden, Quòd voluntas reputabatur pro facto. See before cap. High Treaſon fo.5. Inſidiator viarum. 14 E.3.Cor.115. 22 Aſſ.p.39. 27 Aſſ.38. 24 E.3.42. 13 H.4.7. 9 E.4.28.

CAP. XVII.

In what caſes breakers of priſons are Felons.

WE have ſpoken ſufficiently hereof in his proper place, in the expoſition of the ſtatute of 1 E.2. de Frangentibus priſonam. Only this is to be added, that in caſe of felony, the offender ſhall have the benefit of Clergy, for the breach of priſon. In the ſecond part of the Inſtitutes upon the ſtatute of 1 E.2. De frangentibus priſonam.

CAP. XVIII.

VVhere Eſcape Voluntary is Felony.

VVE have alſo ſpoken ſomewhat hereof in the expoſition of the ſaid Act of 1 E. 2. And the voluntary eſcape can be no felony in the Gaoler, unleſſe the priſoner be under cuſtody by lawfull Warrant expreſſing the offence, which you may ſee there at large.

2. There muſt be a felony done at the time of the eſcape: for a relation which is but a fiction in law, ſhall never make a man a felon, as likewiſe there it appeareth. See Stanford lib. 1. cap. 26. &c.

CAP. XIX.

Of Felonie by ſtealing, carrying away, withdrawing or avoiding of Records, &c. 8 H. 6. cap. 12.

8 H. 6. cap. 12. *SI aſcun Record ou parcel dicel, Breif, Retorne, Pannell, Proces, ou Garrant D'attorny en les courts le Roy, de Chancery, Eſchequer, lun Banke, ou lauter, ou ſa Treaſorie, ſoit voluntarement emblee, emport, retreit, ou avoide per aſcun Clerke, ou auter perſon, a cauſe de quel aſcun Iudgement ſoit reverſe: Que tiel embleor, emporter, retraher, & avoider, lour procurators, councellers, & abbettors ent endites, & ſur proces ſur ceo fait, ont duement convicts per lour proper confeſsion, ou per enqueſts prender des loiall homes, (dont la moitye ſoit des homes daſcun court de meſme les courts, & lauter moitye des auters) ſoient adjudges pur felons, & encorgent la paine de felony, & que les Iudges de les Courts de lun Banke, ou de lauter eyent power de oier & terminer tielz defaults devant eux, & ent fait punition, come devant eſt dit.*

IF any Record or parcell of the ſame, Writ, Retorne, Panell, Proceſſe or Warrant of Attorny in the Kings Courts of Chancery, Exchequer, the one Bench or the other, or in his Treaſury be willingly ſtolne, taken away, withdrawne, or avoided by any Clerk, or by other perſon, becauſe whereof any judgement ſhall be reverſed: That ſuch ſtealer, taker away, withdrawer, or avoyder, their procurators, counſellors, and abettors, thereof indicted, and by Proces thereupon made thereof duly convict, by their own confeſſion, or by inqueſt to be taken of lawfull men, (whereof the one halfe ſhall be of the men of any Court of the ſame Courts, and the other halfe of others) ſhall be judged for felons,

felons, and ſhall incurre the paine of felony. And that the Judges of the ſaid Courts, of the one Bench or of the other, have power to hear and determine ſuch defaults before them, and thereof to make due puniſhment, as afore is ſaid.

The miſchiefe before this ſtatute was, That whereas Records are of ſuch high nature and credit, as they import in themſelves abſolute verity without contradiction; to the end, that there might be an end of contention and controverſie, and men might reſt in ſafety and repoſe, certaine Clerks and other perſons did oftentimes imbeſell Records, or ſome parcell of them, and ſometime a Writ, Retorne, Panell, Proces, or Warrant of Attorney, or raſe or vitiate the ſame; by reaſon whereof divers judgements were avoided, or reverſed, whereby no man (as the ſtatute ſaith) had any thing in ſurety. This was a great miſpriſion, for the which the offenders therein might be puniſhed, either at the ſuit of the King by indictment, or at the ſuit of the party by an Action upon his caſe. See the Record concerning this matter following. Placita coram Juſticiariis de Banco termino Trinitatis Anno 19 E. 1. Rot. 57. indorſ.

Radulphus de Greſhope communis Attornatus de com. Weſtmerland malitioſe Rotulum excurtavit & abſcidit, & ideo per annum & diem committitur Turri London, poſtea anno 20 E. 3. per mandatum Regis liberatur & per Juſticiarios ei eſt inhibitum ne de cætero in eadē Curia de aliquibus negotiis ſe intromittat.

Which remedie and puniſhment were thought too weak againſt Clerks and other perſons, which (committing ſuch things) commonly were of ſmall ability: therefore this Act, conſidering the danger of the offence, maketh the ſame felony, as by the letter thereof appeareth.

¶ Si aſcun * Record.] A Record is regularly a Monument or Act judiciall before a Judge, or Judges, in a Court of Record, entred in a Parchment in the right Roll. It is called a Record, for that it recordeth or beareth witneſſe of the truth, and is derived of the Verbe Recordor, whereof the Poet ſpeaketh,

---Si rite audita recordor.

It hath this ſoveraigne priviledge, that it is proved by no other but by it ſelfe. Monumenta (quæ nos Recorda vocamus) ſunt vetuſtatis & veritatis veſtigia. And albeit the cauſe adjudged be particular, yet when it is entred of Record, it is of great authority in Law, and ſerves for perpetuall evidence, and therefore ought to be common to all, yea, though it be againſt the King: as it is declared by Act of Parliament in Anno 46 E. 3. which you may reade in the Preface to the Third Book of my Reports.

* See the firſt part of the Inſtitutes Sect. 117. for this word.

a 9 E. 4. 3. b. 16 Eliz. Dier 330. a.

Virgil.

Rot. Parl. 46 E. 3. 9 H. 7. 16. See the Preface to the third Book.

¶ Breiſe, Retorne, Panel, Proces, ou Garr' D'attornie.] All theſe are ſufficiently known, and yet have we treated of the ſame in the Firſt part of the Inſtitutes.

¶ En les courts le Roy.] Here are expreſſly named four of the Kings Courts, viz. the Chancery, the Exchequer, the Kings Bench, and the Court of Common Pleas, and hereunto is added the Kings Treaſury: ſo as this Act extendeth not to any other Court or place, then is here named.

¶ Chancery.] This muſt be underſtood of the Court of Chancery, which proceedeth according to the courſe of the Common Law, as in caſe of priviledge, of Scire facias upon Recognizances, Traverſes of offices, and the like: for as to theſe it is a Court of Record, but as to the proceeding by Engliſh Bill in courſe of equity, it is no Court of Record, for thereupon no Writ of Error lieth, as in the other caſes.

37 H. 6. 14.

¶ Ou ſa treaſorie.] The Kings Treaſury is called Theſauraria Regis, the place where the Kings Treaſure is kept. This Treaſure is twofold, viz. his Money or Coine: and another, that is far more precious and excellent, and

those be the sacred Judgements, Records, and other judiciall proceedings under the safe custody of the Treasurer, and Chamberlains of the Exchequer. And this Treasury is partly in the Exchequer, and partly in the Towre of London: for there be ancient Rols of the Treasury remaining in the Towre. And therefore this Act intending to include both the one, and the other, saith generally, en la Treasorie.

Register. F.N.B. 244. d.

¶ Soit voluntarement emblee, emport, retreit, ou avoide.] In the Indictment upon this statute besides felonicè, this word [voluntariè] must of necessity be used, to agree with this Act. Here be four words used, emblee stolne, emport carried away, retreit withdrawne, ou avoide or avoided. So as the sense is, if any Record or part of it, Writ, Retorne, Panell, Proces, or Warrant of Attorny, &c. be stolne, carried away, withdrawn, or avoided, &c. And this word [avoided] is a large word, and doth include, rasing, or clipping, or cutting of the side, or other part of the Roll, or any other kind of avoiding the same.

2 R. 3. 10.

¶ Per ascun Clerk ou auter person.] This Act doth not extend to any Judge of the Court; both because it beginneth with a Clerk, &c. and for that by the statute of 8 R. 2. a penalty is inflicted upon a Judge, &c. for making any false Entry, rasing any Roll, or changing any Verdict. See the Satute; for it extendeth also to Clerks. Only this is to be observed in that Statute, that where it is said, [the King and his Councell,] it is intended of the Court of Justice where the matter dependeth: for the Judges are the Kings Councell for judicature and proceedings according to Law and Justice.

8 R. 2. cap. 4.

2 R. 3. 10.

2 R. 3. 10.

Justice Ingham paid in the raigne of E. 1. Eight hundred Marks for a Fine, for that a poore man being fined in an action of debt at thirteen shillings foure pence, the said Justice moved with pity caused the Roll to be rased, and made it six shillings eight pence.

This case Justice Southcot remembred, when Catlyn Chiefe Justice of the Kings Bench in the raigne of Queen Elizabeth, would have ordered a rasure of a Roll in the like case, which Southcot, one of the Judges of that Court, utterly denied to assent unto, and said openly, That he meant not to build a Clockhouse: for (said he) with the fine that Ingham paid for the like matter, the Clockhouse at Westminster was builded, and furnished with a Clock, which continueth to this day.

¶ A cause de quel ascun judgement soit revers.] This Act extendeth only to Records, whereupon judgement is given. But whether judgement be given in causes criminall at the suit of the King upon an Indictment, or at the suit of the party in an Appeale, or in actions reall, personall, or mixt, or of the like nature, this Act extends thereunto, if judgement be afterwards given, and to Outlawries, for there judgement is given per judicium Coronatorum. For it is not materiall whether the act be done against this Statute, either before or after judgement, so judgement be given.

2 R. 3. 10.

¶ Revers] is here taken, not only where the judgement is made erroneous, and to be reversed by Writ of Error, but where the judgemennt is so annihilated, and made voide, as it bindeth not, or may be reversed or avoided by plea. See the Book in 2 R. 3. fol. 10. which expoundeth well this Statute.

¶ Que tiel embleor, emporter, &c. lour procurers, counsellors & abbettors, &c.] This Act expresly extendeth to Accessories before, and leaveth accessories after to the construction of law, yet may there be accessories after the fact: for whensoever an offence is made a felony by Act of Parliament, there shall be accessories to it both before and after, as if it had been a felony by the Common Law, and therefore though this Act expresseth

Vid. 3 & 4 Ph. & Mar. Justice Dalisons Report, ubi sup.

accessories

accessories before, yet it taketh not away accessories after, but leaveth them to the Law, contrary to the opinion of Justice Stanford. See before the Exposition of 3 H. 7. for taking away of women against their will. Stanf. Pl. Cor. 44. b. 3 H.7.cap.2.

¶ Ent endites.] If the acts that make this felony, be committed in two Counties, the Indictment faileth, as hath bin said before upon the statute of 2 & 3 E.6. cap.24. And this case of felony rising in two Counties, is not holpen by any Statute yet made. 2 R.3.fo.10.

¶ Dont la moity soit des homes dascun court.] Here is a party Jurie, the one halfe to be of the Officers and Clerks of the Court, &c. for their knowledge, and for the better information of the others.

¶ Et que les Judges des dits Courts de lun Bank ou de lauter eyent power de oier & terminer tiels defaults devant eux, & ent faire punition, come est avant dit.] This Clause is in nature of a Commission to the Justices of either Bench, if the offence be committed in the County where the Benches do sit. And the Justices of either Bench have a concurrent authority, and which of them enquire first shall proceed: but if the felony be committed in another County, then where the Benches sit (as for example, in Surry, Hertfordshire, &c.) there the Justices ought to have a Commission. But if the Bench sit in Middlesex, and the felony is done in London, in which case a Commission is requisite, as is aforesaid. But then some have said, that by the Charters of London confirmed by Parliament, the Major ought to be principall in the Commission, and the Major is none of the Judges authorized by this Act to heare and determine this felony, but the Justices of the one Bench or the other: and therefore the statute being penall, and to be taken strictly, no proceeding can be. Sed salva res est: For the Charters of the City of London extend only to such offences committed in London, whereof the Major with others by Commission may inquire of, heare, and determine, and not to such offences so annexed by authority of Parliament to other persons (as in this case to the Justices of the one Bench or the other) as the Major is not warranted by the said Act to inquire, &c. And therefore a Commission in this case may be made to the Justices of the one Bench or the other, omitting the Major, ne Curia Regis deficeret in justitia exhibenda. 2 R.3.10. 2 R.3.11.

And albeit this kinde of felony is an heinous offence, yet may the offenders therein have their Clergy: for untill the raign of H. 7. (that we may note it once for all) the benefit of Clergy was not taken away by any Act of Parliament in case of Felony. As for the Statute of Bigamis made in 4 E. 1. it was but an exposition and allowance of the constitution made at the generall Councell at Lyons concerning the same, as before hath been said. But (as we remember) the First Statute making a new felony that took away the benefit of Clergy, was the Statute of 7 H. 7. concerning Souldiers. Vide Lib. 8. fol. 160. & lib. 11. fol. 11. 4 H.7.cap.13. 12 H.7.cap.ult. 7 H.7.cap.1.

CAP.

CAP. XX.

Of Felony in ſuch as uſe the craft of Multiplication.

5 H 4.c.2.4.

NOne from henceforth ſhall uſe to multiply gold or ſilver, or uſe the craft of multiplication: and if any the ſame doe, he ſhall incur the pain of felony.

This is the ſhorteſt act of Parliament that we remember; before the making whereof, divers of the Nobility, Gentry, and others did waſt and conſume a great part of their inheritance, and wealth, about the art of multiplication, by the ſubtile and ſiniſter perſwaſion of certain impoſters, and deceivers, which took upon them to be skilfull therein, and to be able to multiply gold and ſilver, being themſelves for the moſt part very poor and indigent perſons, of whom it was ſaid, Quòd pollicentur aliis ingentes divitias, & ipſi petunt parvas drachmas. See Chaucer our Engliſh Poet, who wrote about the time of the making of this Act, in the tale of the Chanons Yeoman, fo. 63. (in libro meo,) that The end of this ſliding and curſed craft (ſo full of impoſture and deceit) is extream beggery: He is worth the reading, for he diſcovereth the ſecrets of this Craft, as our Act tearms it.

Now ſeeing the end of this feigned Art of Multiplication is meer deceit, and tendeth to the undoing of many; At this Parliament the uſe of this craft of Multiplication is made felony. For the better underſtanding of that which ſhall be ſaid, it is to be known, that there are ſix kinds of metalls, viz. Aurum, Argentũ, Æs, ſive Cuprum, (quia inventum fuit in Cypro) Stannum, Plumbum, & Ferrum. That is to ſay, Gold, Silver, Copper, Tynne, Lead, and Iron; for Chalybs Steel is but the harder part of Iron, and Orichalcum, Aurichalcum, viz. Lattyn or Braſſe, is compounded of Copper and other things.

*7 E.6.Dier 88. Rot.Pat.34 H.6. m.13.

a Ro.Pat.35 H.6.

b Ro.Pat.34 H.6. m.7.

Hanc artem ſophiſticam impoſturam nominat *Melanchon.* Mentiendi & fallendi artem. *Petrarch. Eraſ.* in Colloquio Dæmonis præſtigias. *Peucerus Chaucer* ubi ſupra. The curſed and sliding craft. *Vertitur in ſumum quicquid ineptus agit.* See *Pancirollus.* Int.nova reperta Tit.7.fo.357.

¶ The craft of Multiplication.] That is, to change other metalls into very gold or ſilver. And this they pretend to doe by a Quint eſſence, or a fifth eſſence. Four Eſſences, or Elements we know, Fire, Aire, Water, & Earth, but ſay they, this Quint eſſence is a certain ſubtill, and ſpirituall ſubſtance extracted out of things by ſeparation from the four Elements, differing really from their eſſence, as Aqua vitæ, the ſpirit of wine, or the like, and this is called Elixar, or the Philoſophers ſtone, and it is part of Alchemie, or Chemie, in latine Ars Chemica. The offenders therein are called multipliers, Chemiſts, Alchemiſts, &c. There * may be Acceſſories to this new felony, both before and after. King Henry the ſixth, by his Letters Patents, de conſilii ſui deliberatione deputavit Willm Cantelo & alios cives civitatis London ad inveſtigandam veritatem ſuper hiis quæ in ſcriptis erunt eis monſtrata, pro multiplicatione Nuniſmatis, tam de auro, quam argento, & quicquid in præmiſſis egerint, cum eorum opinione referrent in ſcriptis regi & concilio ſuo.

The like a Letters Patents anno 35 H.6. pro Thoma Harvie & aliis.

Rex b ex ſua regali prærogativa, &c. dedit licentiam Johanni Faceby & aliis ad inveſtigandum, proſequendum, & perficiendum quandam precioſiſſimam medicinam, quintam eſſentiam, lapidem Philoſophorum nuncupatum, nec non poteſtatem faciendi & exercendi tranſmutationes metallorum in verum Aurum, & Argentum, with a Non obſtante of this ſtatute of 5 H.4. By theſe Letters Patents this Act is more explained, then by any Record we have ſeen.

How theſe ſeveral kinds of metalls, as is ſuppoſed, proceed originally from Sulphur

phur & quicksilver, as from their father and mother, and other things concerning the same, you may at your leisure read in George Agricola lib. 10. ca. 1. Encelms li. 1. ca. 1. Pl. com. 339. Vide Stanf. Pl. Cor. 37. b.

Almighty God in the fourth day created the earth, and no mention is made of metals, for that they were as parts of the earth. Gen. c. 1. v. 9. cap. 2. v. 11.

The fatall end of these five are beggery; This kind of Alchemist, the Monopolist, the Concealer, the Informer, and Poetasters.

Sæpe pater dixit, Studium quid inutile tentas?
Mæonides nullas ipse reliquit opes.

I could give examples (of mine own observation) of all these, if it were pertinent to our purpose.

CAP. XXI.

Of Felony in hunters in the night, or with painted faces, in any forest, Park, or VVarren.

AT every such time as information shall be made of any unlawfull huntings in any Forest, Park, or Warren by night, or with painted faces, to any of the Kings Councell, or any the Iustices of the Kings Peace in the County where any such hunting shall be had, of any person to be suspected thereof, it shall be lawfull to any of the same Councell, or Iustices of Peace, to whom any such information shall be made, to make a warrant to the Sherif of such County, or to any Constable, Bailif, or other officer within the same County, to take and arrest the same person and persons of whom such information shall be made, and to have him, or them before the maker of the same warrant, or any other of the Kings said Councell, or his Iustices of Peace of the same County. And that the said Counsellor or Iustice of Peace, before whom such person, or persons shall be brought, by his discretion have power to examine him or them so brought, of the said hunting, and of the said doers in that behalf: and if the same person * wilfully conceal the same huntings, or any person with him defective therein, that then the same concealment be against every such person so concealing felony, and the same felony to be enquired of and determined, as other felonies within this realm have used to be; and if he then confesse the truth, and all that he shall be examined of, and knoweth in that behalf, that then the said offences of huntings by him done, be against the King our Soveraign Lord, but trespasse finable, by reason of the same confession, at the next generall Sessions of the peace to be holden in the same County, by the Kings Iustices of the same Sessions, there to be sessed. And if any rescous, or disobeisance be made to any person having authority to doe execution, or Iustice by any such warrant, by any person, the which so should be arrested, so that the execution of the same warrant thereby be not had, that then the same rescous and disobeysance be felony, inquirable, and determinable 1 H. 7. ca. 1.

* See the exposition of this word [conceal] hereafter in this chap.

determinable, as is aforesaid. And over this, it is enacted and stablished, that if any person or persons hereafter be convict of any such huntings with painted faces, visors, or otherwise disguised, to the intent they should not be known, or of unlawfull hunting in time of night, that then the same person or persons so convict, to have like punition, as he or they should have, if he or they were convict of felony.

Now let us peruse the words of this new, and ill penned Law.

¶ By night, or with painted faces.] That is to say, either by night, or in the day with painted faces, for that doth equall the case of the night, in respect the offenders cannot be known, or discerned, in regard of such disguisings. And albeit the body of the Act speaketh only of painted faces, yet it extendeth to visors and other disguisings, for those words are in the Preamble rehearsing the mischief, and the remedy must be appliable thereunto, and the last branch of this Act doth make this point clear.

¶ As information shall be made, &c. of any person to be suspect.] Hereby it appeareth, that a bare information without shewing just cause of suspition at the least, is not sufficient to ground a warrant according to this Act, for the words be, [Of any person to be suspected.] And this Act is generall, and extends to all persons of what estate or degree soever, and as well to women, as to men: for the words be [if any person] And generalia verba sunt generaliter intelligenda. And it is necessary for him that taketh the information, to take it in writing, because it is the ground of his warrant.

21 E.1.tit.Forests Rast.19. ¶ Of any unlawfull huntings in any Forest, Park, or Warren.] This Act doth not extend to any Chase of the King, or of any other person, neither doth it extend to any Forests, Parks, or Warrens in use or reputation, and which are not Forests, Parks, or Warrens in law. See the 1. part of the Institutes Sect. 378. what a Forest, a Chase, and a Park, &c. is.

¶ To any of the Kings Councell.] This is understood of the Kings Privy Councell; and any one will serve, but he must be dwelling in the County where such offence is committed.

¶ Or to any the Justices of the Kings Peace, &c.] And likewise any one Justice of the Peace will serve.

¶ Warrant.] This warrant ought to be in writing under the seal of him that maketh it.

¶ Before the maker of the same warrant, or any other, &c.] So as the Officer may carry the party arrested before any Privy Counsellor, or Justice of Peace within that County, and to that effect must the warrant be made.

¶ By his discretion have power to examine him or them so brought of the said hunting, and of the doers in that behalf.] So as the examination must consist upon two parts. First, of the hunting by the party himself. Secondly, of other doers in that behalf.

D.Haward tempore H.1.fo.24. Vide Holl. 10 R.1.153. Vide Camden Brit.210. ¶ And if the said person wilfully conceal the said hunting, or any person with him defective therein.] This branch being in the disjunctive, if he conceal either his own offence, or of the other misdoers with him therein, the letter of this Act is that it is felony, but by construction

ſtruction upon the whole ſtatute, it is no felony: And a hunting without killing of any game, is within the danger of this ſtatute.

This Act is to be taken ſtrictly; for it is the firſt law that was made for the making of any hunting felony, againſt that excellent and equall branch of Carta de Foreſta. Nullus de cætero vitam vel membra pro venatione noſtra, &c. See the ſtatutes of 21 E. 1. 1 E. 3. ſtat. 1. cap. 8. 7 R. 2. ca. 4. Weſtm. ca. 8. Regiſt. fol. 9. F. N. B. fo. 67. Vet. N. B. 41. 45 E. 3. 7. 33 H. 8. Dier, 50. Cart. de Foreſt. cap. 10.

The old ſtatutes concerning the Forests are called the good old Laws, and Cuſtomes, and commanded to be obſerved; and therefore this new Act of H. 7. is too ſevere for beaſts that be feræ naturæ, whereof there can be no felony by the Common law, and that in caſe of the Forests, Parks, &c. of ſubjects, which never was before: And therefore the Judges have made a favourable conſtruction, as hereafter in this Chapter you ſhall find. Rot. Parl. 9 H. 4. nu. 40.

¶ And if he confeſſe the truth, and all that he ſhall be examined of, and knoweth in that behalf.] That is, of his own guiltineſſe, and of other misdoers with him, then this Act makes it no felony, but treſpaſſe finable, as it was before: But it muſt be a wilfull concealment; therefore if he knew not the names of the other misdoers, or knew not whether they were there or no, it is no offence, for the concealment muſt be wilfull. And ſeeing there is no time limited by this Act, and the concealment ought to be wilfull, it were reaſon, that the information ſhould be made in convenient time after the fact done.

¶ And if any reſcous or diſobeiſance be made to any perſon having authority to do execution of Iuſtice by any ſuch warrant by any perſon, the which ſo ſhould be arreſted, ſo that execution of the ſame warrant be not had, that then the ſame reſcous & diſobedience be felony. Here it is to be obſerved that the hunting being as yet no felony, the reſcous could not be felony, if this branch had not been. Herein two things are to be conſidered; Firſt, that it extendeth not but to the reſcous, or diſobeyſance, that is committed by the party himſelf, that is to be arreſted, and not to any other. Secondly, that if the party reſcue himſelf, yet if he be purſued and taken, ſo as execution of the warrant be had, it is no felony, as it is manifeſt by the letter of this branch.

¶ And over this be it enacted, &c. That if any perſon or perſons hereafter to be convict of any ſuch huntings with painted faces, viſors, or otherwiſe diſguiſed, &c. or of unlawfull hunting in the night, * that then the ſame perſon or perſons ſo convict, to have like punition, as he or they ſhould have, as if they were convict of felony.

* Nota [that the] &c. So as before ſuch conviction there is no felony.

Gerrard the Queens Atturney general (who was a grave and reverend man) ſaid openly in the Kings Bench, that it had been reſolved by the Juſtices upon this ſtatute, that if a man in the night, or by day with painted face doe hunt, &c. and being examined according to the act and concealeth it, this is (upon the conſtruction of the whole Act) no felony; for the firſt clauſe concerning concealment, and this clauſe which now we handle, muſt be coupled or joyned by conſtruction together, viz. If any perſon be convict of ſuch hunting with painted face, or of unlawfull hunting in the night, this conviction muſt be upon not guilty pleaded, which the Juſtices expounded to be the * concealment intended in the firſt branch, for they held that it ought to be a judiciall concealment, and not an extrajudiciall concealment, before one of the Privy Councell, or a Juſtice of Peace which may lie in averment, ſo as before it be felony, he muſt be convicted of ſuch hunting, &c. upon not guilty pleaded firſt: and after ſuch conviction

Mic. 19 & 20 El. in the Kings Bench a report of the reſolution of the Juſtices upon this branch.

* Concealment expounded.

then muſt he be indicted again, Super tota materia, that he felonicè did conceal, &c. againſt the form of the ſtatute: and if the offender upon the firſt indictment confeſſeth the indictment, then it is ſuch a judiciall confeſſion as this Act intendeth, and no felony within this ſtatute. And this we heard the Attorney report, and then obſerved it, which concurring with our own opinion we thought good to publiſh, and the rather for that in Maſter Lambards book of Juſtice of Peace amongſt his Precedents of Indictments, an erroneous precedent of an indictment is of felony for the concealment, &c. upon examination before Juſtices of Peace.

Dier 33 H.8. fol.50.a. It is ſaid in 33 H.8. that chaſing in Parks is made felony, (intending this ſtatute) notwithſtanding it may be made treſpaſſe at the pleaſure of the party, which we think is the cleareſt way.

Now what time ſhall be adjudged night, See before in the Chapter of Burglary. For this felony the Delinquent may have his Clergy: See Stanford 37.b.

CAP. XXII.

Of Felony for Imbeſiling the Kings Armour, Ordnance, &c. or Victuall, to the value of Twenty ſhillings, provided for Souldiers.

31 El. cap. 4. BE it enacted by the Authority of this preſent Parliament, that if any perſon, or perſons, having at any time hereafter the charge or cuſtody of any Armour, Ordnance, Munition, Shot, Powder or Habillements of war of the Queens Majeſties, her heirs, or ſucceſſors, or of any victuals provided for the victualling of any Souldiers, Gunners, Mariners, or Pioners, ſhall for any lucre, or gain, or wittingly, adviſedly, and of purpoſe to hinder or impeach her Majeſties ſervice, imbeſill, purloin, or convey away any the ſame Armour, Ordnance, Munition, Shot, or Powder, habillements of war, or * victualls, to the value of twenty ſhillings, at one or ſeverall times: That then every ſuch offence ſhall be judged felony, and the offender and offenders therein to be tried, proceeded on, and ſuffer as in caſe of felony. Provided always, and be it enacted by the authority aforeſaid, that none ſhall be impeached for any offence againſt this ſtatute, unleſſe the ſame impeachment be proſecuted or begun within the year next after the offence done. And that this Act, nor any thing therein contained, nor any attainder nor attainders of any perſon or perſons for any offence made felony by this Act, ſhall in any wiſe extend, or be adjudged, interpreted, or expounded to make the offender or offenders to forfeit, or loſe any lands, tenements, or hereditaments any longer, then during his or their life or lives, or to make any corruption of blood to any the heir or heirs, of any ſuch offender or offenders, or to make the wife of any ſuch offender to loſe or forfeit her dower, or title of dower of or in any lands tenements,

* Nota for Victualls.

tenements, or hereditaments, or her action or intereſt to the ſame: any thing in this Act contained, or any Attainder or Attainders hereafter to be had for any offence made felony by this Act to the contrary notwithſtanding. And that ſuch perſon and perſons, as ſhall be impeached for any offence made felony by this Statute, ſhall by vertue of this Act be received, and admitted to make any lawfull proofe that he can, by lawfull witneſſe or otherwiſe, for his diſcharge and defence in that behalfe, any Law to the contrary notwithſtanding.

This is a neceſſary law, and ſo penned, as it requireth no curious expoſition.

¶ Ordnance.] That is, Guns or Artillerie ſo called, of an Order, or Ordinance anciently made, of what bore, ſize, or bulk the ſame ſhould be. And albeit the Ordinance (that we can finde) is not extant, yet the name remaineth.

¶ Habillements of warre.] Habillement is properly apparell or clothing: but in legall underſtanding it doth not only extend to Harneſſe and Armour, but to all Utenſils that belong to war, without which men have not ability to maintain war.

This Act making a new felony, hath five excellent proviſions, worthy to be imitated in all like caſes of new felonies. Firſt, that none ſhall be impeached for this new felony, but within a year after the offence done. Secondly, that the offender ſhould not loſe his lands any longer then during his life. Thirdly, this Act makes not any corruption of blood, but that his heire ſhall inherit. Fourthly, nor to make the wife loſe her dower. Fifthly, that ſuch perſons as ſhall be impeached for any offence made felonie by this Act, ſhall be admitted to make any lawfull proofe [a] by witneſſe, or otherwiſe for his diſcharge and defence in that behalfe.

Bonum eſt ſcire & ſequi.

Vid. hereafter, Cap. of felony for any having a Plague ſore a more ſpeciall proviſion.

a Nota.

In the ſtatute of 4 Jacobi Regis, there is alſo a good preſident, viz. [All which trials (viz. in caſes of felony in that Act before mentioned) [b] firſt for the better diſcovery of the truth, and ſecondly, for the better information of the conſciences of the Jurie and Juſtices, there ſhall be allowed to the party ſo arraigned the benefit of ſuch witneſſes only to be examined upon oath, that can be produced, for his better clearing and juſtification]: that as witneſſes are produced and ſworne againſt him, ſo he may have witneſſes produced and ſworne for him, for Jurato creditur in judicio. And to ſay the truth, we never read in any Act of Parliament, ancient Author, Book caſe, or Record, that in criminall caſes the party accuſed ſhould not have witneſſes ſworne for him; and therefore there is not ſo much as ſcintilla juris againſt it. And I well remember when the Lord Treaſurer Burleigh told Queen Elizabeth, Madame, Here is your Attourney Generall (I being ſent for) Qui pro Domina Regina ſequitur; ſhe ſaid, ſhe would have the forme of the Records altered; for it ſhould be Attornatus Generalis qui pro Domina veritate ſequitur. And when the fault is denied, truth cannot appear without witneſſes.

4 Jac. regis. cap. 1.

b Nota, two excellent means for advancement of juſtice.

Hobelarius (id eſt, a Light-horſeman) Electus in Scotiam recepit armaturas & denarios, ibidem ſerviturus, poſtea non proficiſcitur per mandatum Regis, & recuſavit reddere armaturas, & denarios, &c. per Juratores eſt culp. & committitur Mareſchallo, & finivit Regi 10 li. & invenit ſecuritatem ad armaturas redeliberandas, &c.

Hil. 16. E. 3. coram Rege. Rot. 129. Norff.

CAP. XXIII.

Of Felonie in such as passe the Sea to serve Forain Princes, &c. or do serve Forain Princes, &c. without taking the Oath of Obedience.

3 Jac.cap.4. EVery Subject of this Realme that shall goe or passe out of this Realm to serve any Forain Prince, State, or Potentate, or shall passe over the Seas, and there shall voluntarily serve any such Foraine Prince, State, or Potentate, not having before his or their going or passing, as aforesaid, taken the Oath of Obedience (prescribed by that Act) before the Customer & Controller of the Port, Haven, or Creek, or one of them, or their or either of their Deputy or Deputies, shall be a Felon.

Some have objected, that the going or passing out of this Realm, to serve, &c. cannot be tried; for that offences done out of the Realme, cannot without a speciall provision be tried within the Realme. And it is a sure Rule, that in criminall causes concerning life or member, Ubi deliquit, ibi punietur: the offence is locall, and cannot be tried, but where it is committed, nor cannot be alleaged to be in any other place, then where in truth it was done. To this it is answered, that by a latter clause in this Act, this felony shall be tried in the Town wherein the Haven or Port is, wherein he went or passed over: which Clause is, And be it further enacted, that all and every offence to be committed or done against this present Act, shall and may be inquired of, heard, and determined before the Justices of the Kings Bench, Justices of Assize and Gaole-delivery in their severall Assises; and all offences, other then Treason, shall be inquired of, heard, and determined before the Justices of Peace in their Quarter Sessions, to be holden within the Shire, Division, Limit, or Liberty, where such offence shall happen. So as by the Purview and meaning of the makers of this Act, this felony must be tried in the County where he went or passed over, and consequently in that Towne where part of the act was done. And these words [and wherein such offence shall be committed] must be construed in this case, where part of the offence is committed. For Sic interpretandum est, ut verba accipiantur cum effectu: and by the expresse words, all and every offence to be committed or done against this present Act must be inquired of, heard, and determined, &c. And therefore the felony cannot passe away with impunity, and that which is done out of the Realme shall be proved to the Jury in evidence. Note where a forain treason by this Act is made, it is enacted to be tryed where the offender is taken.

See 33 H.8.ca.7. Simile.

¶ Every subject of this Realme.] This branch extends to all persons of what estate, degree, or profession soever.

¶ To serve] Albeit the party did not serve, yet if the offender went or passed over to serve without taking the oath, he is in danger of this Statute. And this extendeth to any kinde of service, either in Campe or Army, or in house or otherwise.

Prince. ¶ Any foraine Prince.] [Princeps] Prince is here taken for the person that is Primus, i. Qui primum locum, & gradum obtinet, whether he be King, or any other that hath soveraigne authority, by what name or title soever.

The

The word hath other ſignifications, but not pertinent to the expoſition of this Act.

℄ State.] The former word [Prince] includeth any, that is a Monarch, or in nature of a Monarch, or an abſolute Prince. This word [State] extends to any State, either Ariſtocraticall, where few be in authority, or Democraticall, where the people have the chiefe government without any Superiour, ſaving ſuch as they elect and chooſe. State.

℄ Potentate.] This is a large word, and extendeth to Potentates, as well Eccleſiaſticall as Temporall. Potentate.

℄ Or ſhall paſſe, &c. and there ſhall voluntarily ſerve.] Although he went not over of purpoſe to ſerve, but upon ſome other occaſion: yet if he after voluntarily ſerve any ſuch foraine Prince, State, or Potentate, and have not taken the Oath, he is a felon.

℄ The Oath of Obedience.] This is particularly ſet downe in the ſaid Act.

¶ And that if any * Gentleman or perſon of higher degree, or any perſon or perſons, which have borne, or ſhall beare any Office or place of Captaine, Lieutenant, or any other place, charge, or office in Campe, Army, or Company of Souldiers, or Conducter of Souldiers, ſhall after goe or paſſe voluntarily out of this Realme to ſerve any ſuch Foraine Prince, State, or Potentate, or ſhall voluntarily ſerve any ſuch Prince, State, or Potentate, before he and they ſhall become bound by Obligation with two ſuch ſureties, as ſhall be allowed by the Officers, &c. ſhall be a Felon.

* Vid. hereafter cap. 34. in fine. Second part of the Inſtitutes. The Statute of additions. 1 H. 5. cap. 5.

By this Branch, if he be a Gentleman, or of higher degree, or any ſuch Military man, as here is deſcribed; becauſe he is able to do more harme, if he be ſo diſpoſed, he muſt not only take the Oath by the former branch, but he muſt become bound by this branch with two ſureties, &c. The forme of the Obligation is ſet downe in this Act. The expoſition of the former branch giveth light to the underſtanding of the reſidue of this Clauſe.

There is a Proviſo, that no attainder of felony, made felony by this Act, ſhall take away dower, nor make, or worke, any corruption of blood, or diſheriſon to the heire. The offenders in any of the ſaid caſes of felony may have the benefit of their Clergie.

CAP.

CAP. XXIV.

Of Felonie in Purveyors.

See in the fourth part of the Inſtitutes, cap. Chancery. Articles againſt Cardinal Woolſey. Artic. 33,35,36.

SEE the Statutes of Artic. ſuper Cartas, anno 28 E.1. cap.2. 18 E.2. ca.ult. 5 E.3. cap.2. 25 E.3. cap.1. & 15. 27 E.3. cap.1. 36 E.3. cap.2. And before in the Second part of the Inſtitutes, in the expoſition of the Statute of Artic. ſuper Cartas, cap.2. you ſhall finde in what caſe a Purveyor may be charged with felony, which briefly may be reduced to theſe four Heads. Firſt, [a] if any that take upon him to be a Purveyor, or his deputy or ſervant make purveyance of any thing above twelve pence without Warrant. Secondly, [b] or make purveyance of any thing above twelve pence without teſtimony and appraiſement of the Conſtable, and four honeſt men, and without delivery of Tales. Thirdly, [c] or take any ſheep with their woolles between Eaſter and Midſummer, and carry them to his own houſe and sheer them. Fourthly, [d] or make any takings or buyings, or take any carriage in other manner then is contained in their Commiſſions, they ſhall have puniſhment of life and member: and this Act remains ſtill in force without alteration. The offenders may have the benefit of their Clergie.

a Artic. ſup. Cart. cap.2. 18 E.2. cap. ult. 5 E.3. cap.4.

b 5 E.3. cap.2. 25 E.3. cap.1.

c 25 E.3. cap.15.

d 36 E.3. cap.2. Vid. Stanf. Pl. Cor. 37.b.

e 27 H.8. cap.24.

[c] By this Statute it is enacted, that Purveyors aſſigned by Commiſſion ſhall make purveyance of victuals, corne, [e] other things, as well within Liberties and Franchiſes, as without, any grant, allowance, or other thing to the contrary, or let thereof notwithſtanding: but the Purveyors ſhall obſerve the ſtatutes for them provided in every behalfe, as by that Act appeareth. [f] Upon this Act it was holden, that if the diſcharge of purveyance were by Letters Patents, this Act makes it of no force: but if the diſcharge were by ſtatute, then the Purveyor is bound to obſerve the Statute, as by the ſtatute of 14 E. 3. cap. 1. pro Clero, Eccleſiaſticall perſons are diſcharged by ſtatute, which the Purveyor is bound to obſerve. See the Statutes of 25 E. 3. ſtatut. 5. cap. 21. & 43 E. 3. cap. 3. in what manner and in what time the Kings Butler or his Lieutenant ſhall take Wines, &c.

f Trin. 40 Eliz. coram Rege. In a Quo Warrant. the Lord Darcies caſe.

See more of Purveyors in the fourth part of the Inſtitutes Cap. of the Counting houſe or Green cloth.

See Lib. 8. fo. 45, 46. in Evans caſe, a Commiſſion for taking up of boyes for the Kings Chappell, the generall words well expounded.

Rot. Parl. Anno 28 E.3. nu. 34.

By an Act of Parliament not in print, it is enacted that no purveyor arreſted for any miſdemeanour ſhall have any Privy ſeal, to cauſe ſuch as arreſted him, to come before the Councell to anſwer to the King, but have his remedy by the Common law.

Act a Parliament holden 4 Jacobi Regis.

Upon a grievous complaint made at the Parliament holden in the fourth year of our late Soveraign Lord King James, by the Commons of the Realm concerning many grievances ſuffered by his ſubjects in the execution of a Commiſſion granted to certain perſons for getting of Salt-peter, his Majeſties anſwer (amongſt other things) was, that he had never an intention to make any application of his Prerogative therein, further then might ſtand with the lawfull, and neceſſary uſe thereof. And further his Majeſty was pleaſed out of his gracious care, and goodneſſe to revoke and adnull all Commiſſions, or grants made to any perſon or perſons, for and concerning digging, and working of Salt-peter, intending to conſider of ſuch a courſe afterwards, as the ſame might be made without any juſt cauſe of complaint, as by the ſaid royall anſwer (amongſt other things) more at large appeareth. In purſuance whereof, by the ſaid Kings commandment, Popham Chief Juſtice, and all the Juſtices of England, and Barons of the Exchequer, were aſſembled at Serjeants-Inne in Fleetſtreet, in December, in the ſaid fourth year, to reſolve and certifie,

Salt Peter, *quaſi*, Salis petræ, colligitur aut ex materia quam veteres muri, rupes, & ſaxa exſudant, aut ex terra ſalſuginoſa & puta, quæ in ſtabulis animalium urinam ad multos annos excepit, Latine *Nitrum*.

what

what Prerogative the King had for digging, and taking of Salt-peter in the houſes, buildings, or grounds of his ſubjects, that thereupon a new Commiſſion might be made accordingly, who upon often conferences, and mature conſideration reſolved as followeth.

First, where it was objected, that Gunpowder was inventeđ in Germany, within time of memory, in the reign of King E. 3. ſo as the King could not claim it by preſcription: and that before the 31 year of the reign of Queen Eliz. (which was the yeer after the Spaniſh Invaſion) we, as yet, find not any Commiſſion or licence granted by any King or Queen of this realm to any for the digging or taking of Salt-peter: And in the ſaid 31 year of the ſaid late Queen, two Commiſſions or Licences were granted, the one particular, to George Conſtable Eſquire, to dig, open, and work during the ſpace of ſeven years for Salt-peter within the Counties of York, Nottingham, Lancaſter, Northumberland, Cumberland, and the Biſhoprick of Durham, as well within our own lands, grounds and poſſeſſions, as alſo within the lands, grounds, and poſſeſſions of any of our loving ſubjects within the Counties aforeſaid; and the conſideration of the Grant was, that he ſhould deliver a great quantity of powder to be made by the ſaid George Conſtable, and provided for the ſtore of the Queens Majeſty at a lower rate, then was paid for it before, with this further clauſe; [And further our will and pleaſure is, that the ſaid George Conſtable ſhall at his own proper coſts and charges erect, make up, and lay all mud walls, ſtables, and grounds whatſoever ſo digged up;] whereupon it was inferred that no other buildings could be digged up by force of that Commiſſion, but only ſtables. The other Commiſſion was generall, made unto George Evelyn, Richard Hils, and John Evelyn, and extended throughout the Realms of England and Ireland, and all other the dominions of the ſame, as well within our own proper lands grounds, and poſſeſſions, as alſo within the lands, grounds, and poſſeſſions of any of our ſubjects, with the like clauſe of the erection and reparation, as is aforeſaid, without naming of Manſion houſes by expreſſe words, and without any prohibition to the ſubject to dig for Salt-peter in their own buildings or grounds.

In the Accounts, &c. from the 21 of April 18 E. 3. for one year following Anno Domini 1344. under the title of Artificers and Workmen (inter alios.) Gunners 6. And of their wages & ſtipends per diem, it is ſaid (amongſt others) Gunners ix pence. *Latine* Bombardæ, Tormenta, Sclopi.

Paſch. 49 E. 3. Coram Rege Rot. 27. Oxon. Diverſi malefactores venerunt ad Manerium, &c. cum Arcubus, Sagittis, Baliſcis & Goons.

Vide Rot. Parl. 1 R. 2. nu. 38. William Captain of the Caſtle of Catherick, being charged for delivering it to the enemy, in the reign of E. 3. without Commiſſion, anſwered (inter alia) that the enemies brought to battery thereof nine peeces des groſſes Cannons.

Hollingſh. fo. 453.

Walſing. 10 R. 2. 1366.

Pol. Virgil. De Invent' rerum. fo. 2. c. 2. 11.

Pancerollus Nova reperta. Tit. 18. pag 679. Anno Domini 1378.

John More pag. 196. Anno Domini. 1382.

As to the firſt, it was reſolved by all, That forasmuch as the taking of Salt-peter, was for the neceſſary defence, and ſafety of the Realm that the King had a right of purveyance of it; and ſhould not be driven to buy it in forain parts, which forain Princes might reſtrain, and ſo this Realm might want ſufficient for the defence thereof, to the great peril, and hazard of the ſame: but the King was to take it, for the neceſſary defence of the Realm, according to the limitations hereafter expreſſed; and it is no prejudice to the owners of the ſoyl, for the place that is digged muſt be made up again, and repaired in as good plight as it was before. Secondly, that this taking of Salt-peter in the buildings or grounds of the ſubject, being a purveyance as is aforeſaid, is an incident inſeparable to the Crown, and cannot be granted, demiſed, or tranſferred to any other, but ought to be taken only by the Kings miniſters, as other purveyances ought, and cannot be converted to any other uſe, then for the defence and ſafety of the Realm, for which purpoſe only the law doth give to the King this prerogative; And it is not like to a mine of gold or ſilver in the ground of the ſubject, for there the King hath an intereſt in thoſe metals, and not purveyance only. And if the powder which is ſo made by the Kings Miniſters begin to decay, as it will doe within two or three years, then this either ought to be changed for other, or ſold, and the money thereof comming to be employed for powder for the defence of the Realm, and the Kings miniſters ought to make great proviſion of Salt-peter, for that will laſt a long time, and when need

Purveyance of Salt-peter. See the 1. part of the Inſtitutes. Magna Carta cap. 21.

2.

need is to make thereof gun-powder, which will be made before the Navy can
3. be put in readineſſe, &c. Thirdly, the Miniſters of the King cannot in digging for Salt-peter undermine, weaken, or impair any of the walls or foundations of any of the houſes of the ſubject, be they Manſion houſes, or Out-houſes, as Barns, Stables, Dove-houſes, Mills, or the like, neither can they dig the floor of any Manſion houſe, which ſerves for the habitation of man, becauſe his Manſion is the ſafeſt place of refuge, and ſafety of himſelf and his family, as well in ſickneſſe, as in health, and his defence, as well in the night, as in the day, againſt felons, and misdoers, neither can the Kings miniſters dig the floor of any Barn of the ſubject employed for the ſafe keeping of Corn, Hay, &c. for the floor of a Barn cannot be made dry, or ſerviceable again in a long time, but they may dig in the floors of ſtables, and Orehouſes, ſo that they leave ſufficient room there for the horſes, and other beaſts of the owner, and ſo that they repair the ſame again in convenient time, as well as it was before. They may alſo dig in the floors of cellers, and vaults, ſo that the wine, beer, or other neceſſary proviſion of the owner be not removed, or in any ſort impaired: And they may dig any mud wals, which be not the wals of any Manſion houſe, and in the ruines and decayes of any houſes which be not pre-
4. ſerved for the neceſſary habitation of man. Fourthly, they ought to make the
5. places as well, and commodious for the owner, as they were before. Fifthly, they ought not to work in the poſſeſſions of the ſubject, but between the riſing of the ſun, and the going down of the ſame, ſo as the owner may make faſt the
6. doors of his houſe, and put it in defence againſt misdoers. Sixthly, they ought not to place or fix any furnace, veſſell or other neceſſaries in any houſe or building of the ſubject, without his conſent, nor ſo neer any manſion as he by it
7. may receive any prejudice or diſquiet. Seventhly, they ought not to continue in one place above a convenient time, nor return thither but after a long time.
8. Laſtly, that the owner of the ſoyle cannot be reſtrained from digging, or taking of Salt-peter, for the property thereof is in the owner of the ſoyl, and the King hath but the purveyance thereof, and that every man might work that would, and then there ſhould be more plenty of powder, and at a cheaper rate. And theſe reſolutions are agreeable with that Maxime, * That the Common law hath ſo admeaſured the Prerogatives of the King, that they ſhould neither take away nor prejudice the inheritance of any. And theſe Monopolies being Malum in ſe, and againſt the Common laws, are conſequently againſt the Prerogative of the King, for * the Prerogative of the King is given to him by the Common law, and is part of the laws of the Realm. Which reſolutions were delivered in writing by Popham Chief Juſtice unto the Kings Privy Councell, as the unanimous reſolution of all the Judges, and Barons of the Exchequer, and were by his Majeſties Privy Councell well allowed of, and approved, as Popham Chief Juſtice reported. Upon theſe reſolutions theſe conſequents doe follow. Firſt, if a man of his own Authority, or by colour of any Commiſſion, Licence, or Grant, doth take upon him to take any Salt-peter in the buildings, or grounds of any other ſubject to make thereof gunpowder, in any ſort to his his own uſe, albeit he covenanteth, or agreeth to ſerve the King of ſo many laſts of powder: yet ſeeing it is but a purveyance, he cannot ſell any powder thereof made to any of the Kings ſubjects, or make any private benefit thereof: and if he doe, he may be indicted of digging, and taking of the Salt-peter at the Kings ſuit, & be grievouſly fined and impriſoned, for that it is a grand treſpas with an high hand. Secondly, the party grieved may have his Action of treſpaſſe, and recover damages for the treſpaſſe, &c. according to the quality of the treſpaſſe.

* Pl. Com. 236.

* Stanf. Pl. Cor. 162. a. Stanf. Prer. 5. b.

a Rot. Parl. 4 H. 4. nu. 111. Eodem Anno 81. 9 H. 4. 15.

b Rot. Parl. Anno 9 R. 2. nu. 31. not in print.

a Complaints made againſt Purveyours in Parliament.

b By the ſtatute of 9 R. 2. all ſtatutes made concerning purveyors be confirmed, and to be put in execution, and that Juſtices of peace have power to hear and determine their offences. See the Fourth part of the Inſtitutes, cap. 8. Art. 33. 35. 36. againſt Cardinall Woolſey.

CAP.

CAP. XXV.

Of Felony in wandring Souldiers and Mariners.

1. All idle and wandring Souldiers or Mariners, or idle persons wandring as Souldiers or Mariners, shall be reputed felons, and suffer as in case of felony. 39 El. ca. 17.

So as not only he that is a Souldier, or Mariner in deed, but he that is an idle wanderer, and takes upon him to be a Souldier or Mariner, though in troth he be none, is in danger of this law; for, as the Preamble saith, they abuse the name of that honourable profession.

2. Every idle, and wandring Souldier or Mariner, which comming from his Captain from the seas, or from beyond the seas, that shall not have a testimoniall under the hand of some one Justice of Peace of, or neer the place where he landed, setting down therein the time and place when, & where he landed, and the place of his dwelling and birth, unto which he is to passe, and a convenient time therein limited for his passage, is by this Act adjudged a Felon.

3. Or if he hath such a testimoniall, and shall exceed the time therein limited above fourteen days, he is by this Act a felon, unlesse he fall sick by the way, so as after his recovery he setleth himself in some lawfull course of life, or resort to the place where he was born, or was last abiding: but in both these two cases he must be a Souldier or Mariner in deed.

4. If any such idle and wandring Souldier, or Mariner, or other idle person wandring as Souldier or Mariner, shall forge or counterfeit such testimoniall, he is by this Act a Felon.

5. Or if he shall have with him or them any such testimoniall forged or counterfeit, knowing the same to be counterfeit or forged, he is also by this Act a felon. And in both these last cases, as well he that is a Souldier or Mariner in deed, as he that is none, is in danger of this Act.

And the offender against any of the Articles of this Statute shall not have the benefit of his Clergie.

Justices of Assise, Justices of Gaole delivery, and Justices of Peace, have power by this Act to heare and determine the said felonies.

But if some honest person valued in the last Subsidie to ten pounds in goods, or Forty shillings in lands, or some honest freeholder, as by the said Justices shall be allowed, will be contented before such Justices to take him or them into his service for one whole yeare, and will become bound by recognizance, as the Statute doth appoint, then they shall not proceed any further against him, unlesse such person retained depart within the year, without the licence of him, that so retained him; and then he is to be indicted, tried, and judged as a felon, and not to have the benefit of his Clergie.

CAP. XXVI.

Of Felonie in Souldiers that depart from their Captaines without licenſe.

18 H.6.cap.19. 5 Eliz.cap.5. extendeth it to Mariners and Gunners.

THis Statute is become of little force or uſe: for the ancient manner of retainer of Souldiers whereunto that Act referreth, is utterly altered: for then Knights or Gentlemen expert in war, and of great revenues and livelihood in their Countrey, covenanted with the King to ſerve him in his war for ſuch a time with ſuch a number of men: and the Souldiers made their covenant with their Leaders or Maſters, and then they were muſtered before the Kings Commiſſioners, and entred of Record before them; and that was certified into the * Exchequer; and thereupon they took their wages of the King, as it appeareth by many preſidents of the Exchequer, and may be gathered by the preamble and body of the Act, and by the Regiſter, where it appeareth, that a Writ was framed upon that Statute directed to a Serjeant at Armes ad capiend' conductos ad proficiſcend' in obſequium, &c. And this was thought an excellent Military policy, that the ſouldiers, (part whereof were of their own tenants) ſhould be choſen and led by Knights and Gentlemen of quality of their owne Countrey, with whom they muſt fight in war, and live withall in peace, when they returned into their countrey, in reſpect whereof, the ſouldier would the more cheerfully and obediently follow his Leader, and the Leader would the more reſpectfully and lovingly uſe his ſouldier when he is abroad. See the ancient forme of Commiſſions for arraying and muſtering of men in 5 H.4.

* By the ſtatute of 5 R.2.cap.11.

See the Writ in the Regiſter 191, directed to the Serjeant at armes 5 R.2.cap.10. Rot. Parl. 5 H.4. nu. 29. the like for keeping of Caſtles & Forts.

Rot. Parl. 5 H.4. nu.24,25.

By this Act the benefit of Clergie was not taken away from the Delinquent.

2 E.6.cap.2. renued 4 & 5 Ph. & Mar. cap.3. 1 Ja.cap.25.

The Statute of 2 E.6. cap. 2. extendeth only when the ſouldier departs after that he hath ſerved the King in his war: And ſuch an offender ſhall not enjoy the benefit of his Clergie.

7 H.7.cap.1. 3 H. 8.cap.5.

If any Soldier being no Captain, immediately retained with the King, which ſhall be in wages and retained, or take any preſt to ſerve the King upon the ſea, or upon the land beyond the ſea, depart out of the Kings ſervice without licence of his Captain, that ſuch departing be taken, deemed, and adjudged felony. And that all the Iuſtices in every ſhire of England, where any ſuch offenders be taken, have power to enquire of the ſaid offences, and the ſame to hear, and determine, as they doe and may doe of felony, &c. expreſſed in the Kings Commiſſion to them made, as though the ſame offences were done in the ſame ſhire; and alſo that the departing of ſuch Soldiers, and alſo their retainers, if it be traverſed, be tried in the ſame ſhire, where they be for ſuch a cauſe arreſted, and arraigned.

Both theſe Acts of 7 H. 7. and 3 H. 8. are perpetuall Acts, for this word [King] includeth all his ſucceſſion.

Lib 6.fo.27.Caſe de ſouldiers. Dier 4 Eliz. 211.

¶ Without licence of his Captain.] The ſtatute of 3 H. 8. is without licence of the Kings Lieutenant there.

¶ That all the Juſtices in every ſhire of England, where any ſuch offenders be taken, &c.] This Act of 7 H.7. extends to all the Kings Juſtices in every ſhire, viz. Juſtices of Aſſiſe, Gaol Deliverey, Oier and Terminer, and of the Peace. And if the offender be taken in the County where

where the Kings Bench ſet, he may be indicted, &c. there: but this clauſe in 3 H. 8. is reſtrained to Juſtices of Peace. This clauſe in both the ſaid ſtatutes is cumulative, and for more ſpeedy proceeding with the offender. But admit the offender be never taken, yet may he be indicted of felony in the County where the departure was, and if he appear not, he may be outlawed, for by the firſt clauſe, the offence is made felony, and the ſecond clauſe is affirmative, and not privative. See Stanf. pl. cor. fo. 168. c.

¶ He or they ſo offending ſhall not enjoy the benefit of his Clergy.] This branch in the Act of 7 H. 7. is generall, but in the Act of 3 H. 8. there is an exception out of the like branch, viz. of men being within orders of holy Church. So as it differeth much, whether he be indicted upon the one ſtatute, or the other.

But obſerve what puniſhment the ancient law of England inflicted upon the Souldier that departed from the Kings Hoſt, both before, & ſince the Conqueſt. Item qui fugiet à domino, vel ſocio ſuo pro timiditate belli, vel mortis, in conductione Heretochii ſui in expeditione navali, vel terreſtri, perdat omne quod ſuum eſt, & ſuam ipſius vitam, & manus mittat dominus ad terram quam ei antea dederat. For the expoſition of Heretochius and Hereſlite, ſee the Fourth part of the Inſtitutes, cap. Court de Chivalry. Lamb. Inter leges Edovardi fo. 136. Hoven. Annal. 35. Pœna Hereſlitæ.

Now concerning Armour, Arms, Charges of ſouldiers, muſtering of them, &c. See the ſtatutes in print of Confirmat. Cart. 25 E. 1. Vet. Magna Cart. 2. parte, fol. 35. 1 E. 3. cap. 5. 18 E. 3. ca. 7. 25 E. 3. cap. 8. 4 H. 4. cap. 13. 11 H. 7. cap. 7. and 3 H. 8. ca. 5. and 4 & 5 Ph. & Mar. cap. 3. for appearing at muſters, &c. But 4 & 5 Ph. & Mar. cap. 2. an Act for having of Horſe, Armour, and weapon is repealed by the ſtatute of 1 Ja. ca. 25.

An Act not in print, Rot. Parl. Anno 5 H. 4. nu. 24, 25. for arraying and muſtering of men: for watching of Beacons. &c.

Records of Parliament, 4 H. 4. nu. 48. 7 H. 4. nu. 124. 1 H. 5. nu. 17.

Book Caſes. 48 E. 3. 3, 4. 21 E. 4. 17. per Catesby. 9 E. 4. 26. lib. 7. fo. 7, 8.

See the Second part of the Inſtitutes, Confirmat. Cart. cap. 5. ubi ſupra.

Vide Paſch. 16 E. 2. Phelip Maſter del Hoſpit. de S. Katherins caſe, in libro meo fo. 83. b.

CAP. XXVII.

Of Felony to marry a ſecond husband or wife, the former husband or wife living.

1 Ja. cap. 11.

IF any perſon or perſons within his Majeſties Dominions of England and Wales, being married, doe at any time after marry any perſon or perſons, the former husband or wife being alive, that then every ſuch offence ſhall be felony, &c.

This is the firſt Act of Parliament that was made againſt Polygamy. Polygamia eſt plurium ſimul virorum, uxorumve connubium.

The difference between Bigamy, or Trigamy, &c. and Polygamy is, Quia Bigamus ſeu Trigamus, &c. eſt qui diverſis temporibus, & ſucceſſive duas, ſeu tres, &c. uxores habuit. Polygamus, qui duas vel plures ſimul duxit uxores.

¶ If any perſon.] This Law is generall, and extendeth to all perſons, of what eſtate, or degree ſoever.

See the 1. part of the Inſtitutes Sect. 104.

If the man be above the age of fourteen, which is his age of conſent, and the woman above the age of twelve, which is her age of conſent, though they be within the age of one and twenty, are within the danger of this law, which appeareth by this, that this Act extendeth not to a former marriage made within the age of conſent, as hereafter ſhall appear.

¶ Being married, &c.] This extendeth to a marriage de facto, or voydable by reaſon of a precontract, or of conſanguinity, or of affinity, or the like: for it is a marriage in judgement of law untill it be avoided, and therefore though neither marriage be de jure, yet they are within this ſtatute.

¶ Doe at any time marry.] This ſecond marriage is meerly void, and yet it maketh the offender a felon.

And the party and parties ſo offending, ſhall receive ſuch and the like proceeding, triall, and execution in ſuch County, where ſuch perſon or perſons ſhall be apprehended, as if the offence had been committed in ſuch County, where ſuch perſon or perſons ſhall be taken or apprehended.

See before the expoſition of the ſtatutes of 7 H. 7. and 3 H. 8. concerning departing of ſouldiers, &c.

See 12 E. 4. Conſultation. 5. The opinion of the Doctors. Pains caſe lib. 9. fo. 72.

But of the generality of this law, there be Five exceptions: Firſt, it extendeth not to any perſon or perſons, whoſe husband or wife be continually remaining beyond the ſeas, by the ſpace of ſeven years together. By this branch notice is not materiall, in reſpect of the Commorancy beyond ſea.

Secondly, it extends not, when the husband or wife ſhall abſent him or her ſelf, the one from the other, by the ſpace of ſeven years in any parts within his Majeſties Dominions, the one of them not knowing the other to be living within that time. Here notice is materiall, in reſpect the Commorance is within the Realm.

Thirdly,

Thirdly, nor to any perſon or perſons, that at the time of ſuch marriage be divorced by any ſentence had in the Eccleſiaſticall Court.

There be two kinds of divorces, the one that diſſolveth the marriage à vinculo matrimonii; as for precontract, conſanguinity, &c. and the other à menſa & thoro; as for adultery, becauſe that divorce by reaſon of adultery, cannot diſſolve the marriage à vinculo matrimonii, for that the offence is after the juſt and lawfull marriage. This branch in reſpect of the generality of the words, priviledge the offender from being a felon, as well in the caſe of the divorce à menſa & thoro, as where it is à vinculo matrimonii, and yet in the caſe of the divorce à menſa & thoro, the ſecond marriage is void, living the former wife or husband. And if there be a divorce à vinculo matrimonii, and the adverſe party appeal, which is a continuance of the former marriage, and ſuſpend the ſentence, yet after ſuch a divorce, the party marrying is no felon within this ſtatute, in reſpect of the generality of this branch, although the marriage be not lawfull.

Fourthly, nor to any perſon or perſons, where the former marriage is by ſentence in the Eccleſiaſticall Court declared to be void and of no effect.

Fifthly, nor to any perſon or perſons, for or by reaſon of any former marriage made within age of conſent: Whereby it appeareth that the makers of the law intended that this Act ſhould extend to every perſon above the age of conſent.

If the man be above fourteen, and the wife under twelve, or if the wife be above twelve, and the man under fourteen, yet may the husband or wife ſo above the age of conſent, diſagree to the eſpouſals, as well as the party that is under the age of conſent; for the advantage of diſagreement muſt be reciprocall. And ſo it was reſolved by the Judges and Civilians, Trin. 42 Eliz. in the Kings Bench, in a Writ of Error between Babington and Warner. So as if either party be within age of conſent, it is no former marriage within this Act. Trin. 42 Eliz. Coram rege. Inter Babington & Warner.

The offender againſt this ſtatute may have the benefit of his Clergy.

If he be a Nobleman and Lord of Parliament, he ſhall be tried by his Peers, albeit there be no proviſion ſpeciall for it: for of common right, (that we may ſay it once for all) in caſe of treaſon, felony, and miſpriſion of treaſon or of felony (as hath been ſaid before) he is to be tried by his Peers.

I find that by the ancient law of England, that if any Chriſtian man did marry with a woman that was a Jew, or a Chriſtian woman that married with a Jew, it was felony, and the party ſo offending ſhould be burnt alive. Marriage in ſome ſort felony by the Common law.

Contrahentes cum Judæis, Judæabus, Pecorantes, & Sodomitæ in terra vivi confodiantur, &c. Fleta lib. 1. ca. 35. §. Contrahentes.

CAP.

CAP. XXVIII.

Of Felony for any having a Plague ſore upon him, contrary to commandment goeth abroad, &c.

1 Jac. ca. 31.

IF any perſon infected with the plague, commanded (by ſuch perſons as are appointed by the Act) to keep houſe, ſhall contrary to ſuch commandement wilfully and contemptuouſly goe abroad, and ſhall converſe in company, having any infectious ſore upon him uncured, ſuch perſon ſhall be adjudged a felon.

Levit. cap. 13. Numb. cap. 5. Regiſt. F.N.B. 234. Bfede Leproſo amovendo Bract. lib. 5. f. 421. a. Brit. fo. 39. 88. Fleta li. 6. ca. 39. 22 E. 3. Rot. Clauſ. 2. parte nu. 14.

This is felony, albeit no other perſon by ſuch means be infected, for this ſtatute was made to prevent the moſt horrid and fearfull infection of the plague. The law was generall, and extended to all eſtates and degrees whatſoever, and was grounded upon the law of God: and the reaſon of the law of the Realm is, that the infectious ſick ſhould be removed from the whole. The party offending might have had the benefit of his Clergy.

Here is a rare Proviſo, That no attainder of felony by vertue of this Act, ſhall extend to any attainder, or corruption of blood, or forfeiture of goods, chattels, lands, tenements, or hereditaments.

In this Proviſo theſe things are to obſerved: First, that by the avoyding of the corruption of blood, the wives dower is impliedly ſaved: for where the heir ſhall inherit, the wife ſhall be endowed againſt the heir. Secondly, that there ſhall be * no forfeiture of goods, or chattels, which is rare, and the like we have not obſerved before, and by conſequent the offender may make his Will and Teſtament, and if he doe not, the Ordinary ought to grant adminiſtration of the goods and chattels, as he ought to doe in other caſes.

* Nota.

Theſe words [to any attainder or] muſt be omitted, and the ſenſe to be, to any corruption of blood, for (as it is printed) it is, that no attainder of felony ſhall extend to any attainder, &c.

This Act is become of no force for want of continuance, and is expired ſince we wrote this chapter, therefore to be put out of the charge of the Juſtices of Peace.

CAP.

CAP. XXIX.

Of Felonie in Jaylers by dures of Impriſonment, &c. by ſtatute, and by the Common law.

IF it happen that the keeper of the priſon, or underkeeper by too great dures of impriſonment, and by pain make any priſoner that he hath in his ward to become an * Appellor, againſt his will, and thereof be attainted, he ſhall have judgement of life and member.

14 E.3.ca.10. Geol in French is a priſon. Geolier a keeper of a priſon. Anglice, a Jayl, or Jayler.

* An Approver.

3 E.3.Cor.295.

Before the making of this ſtatute, if a Jayler had by dures of impriſonment made his priſoner become an Approver, to appeal honeſt men for his own private, of intent to have of their goods, when they were committed to his cuſtody, and to retain them in priſon without being let to mainprize, and the Appellees upon his appeal be hanged: this is felony in the Jayler by the Common law: but if the Appellees were acquited, then it was no felony, but a great miſpriſion in the Jayler, which was one of the cauſes of the making of this Act: for by this Act, if the priſoner become an Approver againſt his will, whether the Appellees be acquited, or attainted, or after the approvement not proceeded with, and whether the approvement be true or falſe, ſo it be by dures of impriſonment, and againſt the will of the priſoner, it is Felony. * For it is not lawfull for any man to excite or ſtir any other to a juſt accuſation, complaint or lawfull ſuit, for Culpa eſt ſe immiſcere rei ad ſe non pertinenti; (and ſo was [a] it reſolved Mich. 7. Ja. in the Starchamber, in Sir John Hollis his caſe, by the whole Court) much more to doe it by dures of impriſonment, moſt of all by a Jayler, who hath the cuſtody of the priſoner committed to him, to enforce him by dures to become an Approver. And therefore this law hath made it felony in the Jayler or Under-jayler.

18 E.3.Cor.272.

*1 E.3.ca.14.
20 E.3.cap.5.
1 R.2.ca.4.
W.1.cap.36.
11 H.4.2.91.
22 E.3.15.
See the expoſition of W.1.c.28.

[a] Mich.7 Jacobi in Curia ſtellat. Sir John Hollis caſe.

¶ Keeper of the priſon, or Under-keeper.] If he be keeper, or Under-keeper, de jure, or de facto, by right or by wrong, he is within the Purview of this ſtatute.

11 H.4.73. ſimile
13 E.3.bar.253. ſimile.

¶ By too great dures of impriſonment.] Every impriſonment is taken and deemed in Law duritia, dures: a little addition to it by the Jayler is too great dures in this caſe.

¶ To become an Appellor.] That is, an Approver.

¶ Againſt his will.] That is, when the priſoner never would have done it of his own will, if the Jayler, or Under-jayler had not enforced him thereunto.

* W.2.cap.34.
28 E.3.ca.3.
13 R.2.ſtat.2. cap.3.
1 E.2.De frang. priſonam.
9 E.4.fo.26.
Br.Cor.203.

¶ Judgement of life or member.] * Theſe words doe imply felony. For this offence, the offender ſhall have the benefit of his Clergy.

[b] If the Jayler keep the priſoner more ſtraitly then he ought of right, whereof the priſoner dyeth, this is felony in the Jayler by the Common law. And this is the cauſe, (as before hath been ſaid) that if a priſoner die in priſon, the Coroner ought to ſet upon him. See before Cap. Petit Treaſon fo. 34. how priſoners are to be demeaned.

[b] Britton fo.18. Fleta lib.1,c.26. Verſus finem. Mirror cap.1. §.9. De homicidio.

How

14 E.3.ca.10. 19 H.7.ca.10. Li.4. fo.34. Muttons caſe. Parl. 18 E.3. nu.43.

How Gaoles are rejoyned and united to the office of Sheriffs, ſee this ſtatute of 14 E.3.ca.10. 19 H.7.ca.10. Lib.4.fo.34. Muttons caſe. Adde thereunto Rot. Parl. 18 E.3.nu.43. and ſo was it decreed in Forteſcues caſe, in the Exchequer chamber, Anno 2. Car. Regis.

2 Car. Regis in the Exchequer Chamber. Forteſcues caſe.

CAP. XXX.

Of Felony by bringing in, payment, or receipt of certain money.

3 H.5.cap.1. Stat.1. Raſt. Abb.Tit. money nu.27.

IT is felony to make, coin, buy, or bring in, and put in payment, &c. any Galley half pence, Suskyn, or Dotkyn.

The reaſon of this law was, for that theſe moneys were baſe, and not of the Allay of Sterling, which was (amongſt others) the cauſe of the making of the generall law of 9 H.5.cap.6. Stat.2.

9 H.5.c.6.Stat.2.

2 H.6.ca.9.

It is felony to pay, or receive for payment any money called Blanks. For the better underſtanding of this ſtatute, it is to be known, that theſe Blanks were white money coyned by King H. 5. in France after his victory at Agincourt, and league with France, whoſe ſtyle then was, Rex Angliæ, Regens & hæres Franciæ. And they were called Blanks or Whites in reſpect of the colour, becauſe at the ſame time he coyned alſo a Salus in gold, the Salus, being of the value of twenty two ſhillings, was of the allay of ſterling: but the Blanks, which were much more common, being each of them valued at eight pence, were not of the allay of ſterling, and therefore they only were decried by the ſaid Act of 2 H.6.

See the Second part of the Inſtitutes. Artic. ſuper Cartas. cap.20.

For either of theſe offences of felony the offender may have his Clergy.

CAP. XXXI.

Of felony for tranſportation of Silver, or importation of falſe or evill money, &c.

Mirror c.1.§.3. Inter les Articles de viels roys ordeins. Rot.Parl.17 E.3. nu.15.not printed.

Defendue fuit que nul Argent ſerra tranſport hors del Realm.

This was the ancient law of England long before the Conqueſt.

At the Parliament holden Anno 17 E. 3. as well the tranſportation of ſilver, as the importation of falſe and evill money, is enacted by authority of that Parliament to be Felony. And alſo if the ſearchers mentioned in the Act be aſſenting to the bringing in of falſe money, or willingly ſuffering ſilver or money to be tranſported, it is alſo made Felony. But becauſe this Act was never printed nor tranſlated into Engliſh, and for that there be other things obſervable, enacted thereby, worthy to be known, we will tranſcribe the ſame, De verbo in verbum in proprio Idiomate.

Le

Le Parliament tenus a Weſtm: a la Quinzeme de Paſch. du raign noſtre Seignior Le Roy Edward Tiers apres le Conqueſt Dys & ſeptiſme.

Item accorde eſt de faire une Monoie des bones Eſterlings en Engleterre du Pois & del [a] *Alay del auncient Eſterling, que avera ſon cours en Engleterre entre les Grandz & la Comune de la terre, & la quele ne ſerra portes hors du royalme dengleterre en nulle manere, ne pur quecunque cauſe que ceo ſoit. Et en caſe que les Flemings voillent faire bone monoie dargent groſſes ou autres accordant en alay es bones eſterlings, que tiel monoie eit cours en Engleterre entre Merchand & Merchand & autres qi la vodroient reſceuire de lour bone gree, iſſint que nul argent ſoit portes hors du Roialme.*

Item eſt accordes & aſſentus, que bones gents & loialx ſoient aſſignes es Ports de miere, & ailours, eu mieſter ſerra, de faire la ſerche que nul argent ſoit portes hors du Roialme en monoie n'autrement, forſpris que les Grandz quant ils vont per dela qils penſent aver veſſeals dargent pur ſervir lour hoſtels: Et que nul ſoit cy hardy [b] *de porter fauſſe & malvois monoie en Roialme, ſur paine de forfeiture de vie & de membre, & a faire eſchanges a ceux qi paſſeront la miere d'or pur lour bones Eſterlings a la value.*

Item aſſentus eſt & accordes, que les dits Sercheours, per cauſe qils ferront lour offices plus diliagement & plus loialment, [c] *ils eient la tierce partie de tote la fauxe monoie, qils purront trover portee deins le Roialm a lour proffit demeen: Et en meſme la manere eient la tierce partie de la bone monoie quele ilz troveront en la miere paſſent hors de la terre. Et en caſe qils ſoient troves negligents ou rebealx a tieux ſerches faire,* [d] *que lour terres & tenements, biens & chateux ſoient ſeiſes en la main le Roy, & lour corps pris, & detenus tanque ils eient fait fine au Roy pur lour diſobeiſance. Et en caſe quils ſoient* [e] *aſſentants de porter tiels fauxe monoie, & de ſueffrire ſachantement largent ou monoie autrement, (forſpris ques les Grandz quant ilz vont per dela qils penſent aver veſſeals dargent pur ſervir lour hoſtels come de ſuis eſt dit) eſtre meſnes hors du Roialme, eient judgement de vie & de membre.*

[a] See Britton cap. 5. fo. 10. b. Ceſt allay eſt ſolonque le forme & uſage del Realm. Mirror ca. 1. §. 3. before the Conqueſt. & cap. 1. §. 6. & cap. 5. §. 1. See inter leges Æthelſtani. c. 14. Canuti ca. 8. Fleta lib. 1. c. 22. Glanv. li. 14. c. 7. Of what weight and allay the Kings money ſhall be. 25 E. 3. ca. 13. 9 H. 5. ca. 11. See before cap. Treaſon. Verb. *Sa monye.* See the ſecond part of the Inſtitutes. Artic. ſuper Cartas cap. 20.

[b] This is felony. See the like in the ſecond part of the Inſtitutes. 1 E. 2. De frangi-bus priſonam. 14 E. 3. 10. &c.

[c] The reward of the Searchers if they be diligent, &c.

[d] The puniſhment of them if they be negligent, &c.

[e] Their aſſent to the bringing in of falſe money, or wittingly to ſuffer ſilver, or money, &c. to be tranſported, is Felony.

Item, IT is accorded to make money of good Sterling in England of the Weight and Allay of the ancient Sterling, which ſhall be currant in England between the Great men and Commons of the Land, and the which ſhall not be carried out of the Realm of England in any manner, nor for any cauſe whatſoever. And in caſe, that the Flemings will make good money of ſilver groſſe or other, according in

allay of good ſterling, that ſuch money ſhall be currant in England between Merchant and Merchant, and others, who of their own accord will receive the ſame, ſo that no ſilver be carried out of the Realm.

Item, It is accorded and aſſented, That good and lawfull men be aſſigned in the Ports of the ſea, and elſewhere, where need ſhall be, to make ſearch, that no ſilver be carried out of the Realm in money or otherwiſe, (except that the Great men may when they goe out of the Realm, have ſilver veſſels to ſerve their houſes) And that none be ſo hardy to bring falſe and ill money into the Realm upon pain of forfeiture of life and member, and to make exchanges with them, that ſhall paſſe the ſea, of gold for their good ſterling to the value.

Item, It is aſſented and accorded, that the ſaid Searchers, becauſe they may doe their offices more diligently and more lawfully, ſhall have the third part of all the falſe money that they can find to be brought into the Realm for their own benefit; And in the ſame manner they ſhall have the third part of the good money which they ſhall find upon the ſea paſſing out of the Realm. And in caſe they ſhall be found negligent or diſobedient in making ſuch ſearches, that their lands and tenements, goods and chattels ſhall be ſeiſed into the Kings hands, and their bodies taken and detained untill they have made fine to the King for their diſobedience. And in caſe they ſhall be aſſenting to the bringing in of ſuch falſe money, or wittingly ſhall ſuffer ſilver or money (except veſſels of ſilver for the Great men when they goe out of the Kingdome to ſerve in their houſes, as before is ſaid) to be tranſported out of the Realm, they ſhall have Judgement of life and member.

The offenders in caſe of felony made by this Act may have the benefit of their Clergy.

CAP.

CAP. XXXII.

Of Felonie for carrying of VVooll, VVoolfels, Leather, or Leade out of the Realme.

NO Merchant, Engliſh, Welch, or Iriſh, ſhall carry any manner of Wools, Leather, Woolfels, or Lead, out of the ſaid Realme and Lands, upon paine of forfeiture of life and member, nor ſhall tranſport any of the ſaid Wares or merchandizes in the name of merchant ſtrangers, nor ſhall ſend or hold their ſervants, &c. in the parts beyond the ſea to ſurvey the ſale of the ſaid wares or merchandizes, or to receive the money comming of the ſale of the ſame, nor take payment of gold or ſilver, nor of any other thing in recompence or commutation, or in the name of payment in the parts beyond the ſea out of the Realme and lands aboveſaid of merchandizes ſold in England, Ireland, or Wales, touching the Staple, but that all ſuch payment ſhall be made in gold or ſilver, or merchandizes in England, Ireland, or Wales, where the contract was made, upon paine of life and member.

27 E. 3. cap. 3. the ſtatute of the Staple.

Mirror cap. 1. § 3. Inter les artic. per vieles royes ordeins. Defendu que nul ne ameſnaſt leyne hors del realme.

That no Merchant privie nor ſtranger, nor any other, of what condition that he be, go by land or by water towards wines, or other wares or merchandizes coming into our ſaid Realme or Lands, in the Sea, nor elſewhere to foreſtall or buy the ſame, or in other manner to give earneſt upon them, before that they come to the Staple, or to the Port where they ſhall be diſcharged; nor enter into the ſhips for ſuch cauſe, till the merchandizes be ſet to land to be ſold, upon paine of loſſe of life and member. Cap. 11.

No Merchant privie, ſtranger, or other ſhall carry out of our Realme of England, Wools, Leather, or Woolfels to Barwick upon Twede, nor elſewhere, nor into Scotland upon the like paine, nor that any Merchant, nor any other ſell his Wools, Woolfels, or Leather, to any of Scotland, nor to any other to carry into Scotland: upon the like paine. Cap. 12.

If the Merchants or other people of Ireland or Wales, after they be in the ſea with their merchandizes, do paſſe to any place, other then to the Staples in England: it is felony. Cap. 18.

No Merchant, or other ſhall make any conſpiracie, confederacy, &c. or ill device in any point, that may turn to the impeachment, diſturbance, defeating, or decay of the Staples, &c. and if any do, and be thereof attainted before the Major and Miniſters of the Staple, or other whom the King ſhall aſſigne, he ſhall incurre the paine of loſſe of life and member. Cap. 25.

Item, *ou auterfoitz fuit orden en * leſtatuts de Leſtaple que nul Englois paſſera la mere ove leynes, quire, pealtz lanuts, ne per auter, ſur peine de forfeiture de vie & member, terres & tenements, biens et chateux: Eſt accord que la forfeiture de vie & member ſoit ouſte de tout en leſtatute de Leſta-*

38 E. 3. cap. 6. 27 E. 3. ca. 3. &c. ſtat. Stapulæ.

ple, & que nul home ſoit impeach per tiel forfeiture de vie & member, cibien in temps paſſe come avenir, la forfeiture des terres & tenements, biens & chateux eſteant en ſa force. The ſame in Engliſh.

Alſo, where heretofore it was ordained in the ſtatutes of the Staple, that no Engliſh man ſhould paſſe the ſea with Wools, Leather, Woolfels, nor by other, upon paine of forfeiture of life and member, lands and tenements, goods and chattels. It is accorded that the forfeiture of life and member be ouſted in the whole in the ſtatute of the Staple, and that no man be impeached by ſuch forfeiture of life and member, as well in times paſt, as to come, the forfeiture of the lands and tenements, goods and chattels, being in his force.

By the expreſſe letter of the body of this Law, the forfeiture of life and member is ouſted de tout in the ſtatute: therefore it is holden, that the felony is taken away throughout the ſtatute, but the forfeiture of lands and goods remaineth by the expreſſe letter of this Act.

18 H.6. cap.15. Stanf.Pl.Cor. 37. b.

By the Statute of 18 H.6. No man ſhall carry Wooll, or Woolfels, out of this Realme to other places, then to the Staple at *Callice*, without the Kings licenſe, upon paine of felony, &c. And that as well Commiſſioners aſſigned, as the Iuſtices in every County where ſuch Wools and Woolfels ſhall be ſo carried out, have power and authority to enquire of the premiſes, and them to hear, and determine, &c.

But this Act extendeth not to Wools which ſhall paſſe the ſtrait of Marroke. And this is a perpetuall law, and cannot be expired, as it is ſuppoſed in the laſt impreſſion of the ſtatutes at large, but it extendeth only to Wools and Woolfels. The offender herein may have his clergie.

And for the better underſtanding of ancient Statutes and Records concerning Wools, it is neceſſary to explaine certaine words and termes. By the ſtatute of 25 E. 3. cap.9. A ſack of wooll containes but twenty ſix ſtone, and every ſtone fourteen pound, where before it was a twenty eight ſtone.

a Compoſ. de ponderibus vet. Mag. Carta, 2 part.fo.31. Saccus lanæ. Rot.Parl.27 E.3. nu. 53.

Pochet of Wooll, unde Pochettum, that is, a little poke or ſack containing halfe a ſack of wooll. Sarpler, unde Sarpleia, is alſo halfe a ſack, and is derived from the French word Sarpillier, which ſignifieth a Wrapper, within which wrapper halfe a Sack is contained.

b Compoſit.de ponderibus, ubi ſupra.

b A Weigh of wooll, unde Waga, is halfe a ſack.

A Tod or Toit of wooll, unde Toddum lanæ, containeth two ſtone, and is derived from the French word Toiler, which is a Wrapper, within which by uſage two ſtone of wooll is foulded: ſome fetch it from the Flemmiſh word Dodderem, which ſignifieth nectere, to weave, becauſe it is woven into cloth. Petra lanæ is a Stone of wooll, ſo called, becauſe the Weight, being a ſtone, containes fourteen pound.

CAP.

CAP. XXXIII.

Againſt tranſportation of Iron, Braſſe, Copper, Latten, Bell-metall, Pan-metall, Gun-metall, or Shroofe-metall, (Tinne and Lead only excepted.)

The tranſportation of theſe are prohibited by divers Acts of Parliament upon the penalties therein expreſſed. And hereby is prohibited the tranſportation of any Gunnes whatſoever, a neceſſary law, and worthy of due execution. 28 E.3. cap.5. 33 H.8.cap.7. 2 E.6.cap.37. See the penalties in the Statutes themſelves, which are thought to be too weak.

And we have obſerved, that God hath bleſſed this Realme with things for the defence of the ſame, and maintenance of trade and traffick, that no other part of the Chriſtian world hath the like: viz. Iron to make Gunnes, &c. more ſerviceable and perdurable then any other. Secondly, Timber for the making and repairing of our Navie, and eſpecially of the knees of the ſhips, better then any other. Thirdly, * our Fullers earth is better for the fulling of our cloth, then any other. Fourthly, our wooll makes better cloth, and more laſting and defenſible againſt winde and weather, then the wooll in any Nation out of the Kings dominions; and many other ſpeciall gifts of God. Ferrum à feriendo. Timber is a Saxon word, in old French, Marem, unde Maremium. Latine, Ligni materia, vel Lignum ædificatorium. * Terra fullonica

But here will we ſtay, and pray, that none of theſe may be tranſported for many inconveniencies, that will follow thereupon.

CAP. XXXIV.

Of Felony for ſtealing of a Faulcon.

EVery perſon that findeth any Falcon, Tercelet, Lanner, or Laneret, or any other Falcon, that is loſt of his Lords, that forthwith he ſhall bring it to the Sherif of the County, and that the Sherif make proclamation, &c. and if any ſteal any Hawk and the ſame carry away not doing the Ordinance aforeſaid, it ſhall be done of him as of a thief that ſtealeth a horſe or other thing. 37 E.3.cap.19.

The ſtatute of 34 E.3. inflicted the penalty for the concealing and taking away of the Hawk, two years impriſonment, and the price of the Hawk to the Lord, if he hath wherewith, and if not, he ſhall the longer abide in priſon. This Act of 37 E.3. maketh the offence Felony. 34 E.3.cap.21.

The new printed book of the Statutes at large, in ſtead of theſe words, (or any other Falcon) hath, or any other Hawk. Printed for the Society of Stationers, 1618.

I have ſeen ſome manuſcripts (in theſe words) in the originall tongue, wherein the ſtatute was publiſhed. Que quecunque perſon que trove Faucon, Tercelet, Lanier, ou Lanyret, Auſtor ou auter Faucon. And both theſe differ from the truth of this law. For the firſt extendeth this Act to any Hawk whatſoever. And the manuſcript to Auſtor or Autor, a Goſhawk, whereas in truth, this law extendeth onely to ſuch as be of the kinde of Faulcons, being long-winged Hawks, which many times by flying far off are loſt, and not to any ſhort See hereafter, cap. Larceny, verb. Perſonall goods, &c.

ſhort-winged Hawk, as the Goſhawk, the Tercel of the Goſhawk, the Sparhawk, &c. And in the body of the Act this word (Faulcon) is ever uſed, and not this word (Hawk,) as hereafter appeareth. We would have been glad to have cleared this point [illegible] Record of the Parliament Roll, but the Roll of this Act is not to be found, and yet being a generall law, the Judges are to take notice thereof: and that which I have ſet down as the words of the law, agreeth with the firſt impreſſion thereof, and with all ſucceeding impreſſions ſaving the laſt.

Lib.8.fo.27,28. In caſu principis.

¶ Every perſon.] This is a generall law, and extendeth to all perſons of what degree or ſex ſoever.

¶ That findeth.] Note by the Common law the felonious taking of any Hawk long-winged, or ſhort-winged, from the Pearch, &c. or from the perſon of any man, with a mind to ſteal her, is robbery: but the finding of a Faulcon, though he concealed, denied, or ſold her, was no felony, but by this Act.

¶ Any Faulcon.] By this and the laſt words, or any other Faulcon, it appeareth that only Faulcons are within this law, as beſides thoſe that are here named, the Gerfaulcon, Girofalco, or Ardearius, and the Tercell, which is called a Jerkin; and the Lanner is called Falcunculus. But the Merlyn, which is called Æſalo, and the Hobby, which is called Alaudaria, though they be long-winged Hawks, yet being not of the kind of Faulcons they are not within this ſtatute, neither is any ſhort-winged Hawk, as the Goſhawk, the Tercell of the Goſhawk, or the Sparhawk, &c. as hath been ſaid, within this Act.

¶ Tercelet.] This is the Tercell of the Faulcon, called a Tercell gentill, the male of the Faulcon called Terciolus, quia tertia parte minor ſit femella, becauſe the Tercell is a third part leſſe then the female.

¶ Lanner and Laneret.] Theſe (as hath been ſaid) are of the kind of Faulcons, which appeareth not only by the name Falcunculus, but by the words of the Act, for having named the Lanner and Laneret, it is ſaid, or any other Faulcon.

Albeit theſe Hawks, that ſhall be ſo loſt, have no Vervels, yet muſt the finder carry them to the Sherif, for Vervels are not required by this Act. The only thing that the finder is to doe, to ſave himſelf from felony, is forthwith (the word in the originall is maintenant) after his finding to carry the Hawk to the Sherif.

¶ That is loſt of his Lords.] Lords are taken here for the owners, the word in the originall is Seignior, which ſignifieth as well a Proprietary, as a Lord.

10 E.4.1. 7 R.2.barre 241. Lib.5.fo.108. Sir Hen. Conſtables caſe.

¶ To prove reaſonably.] This is not intended according to the generall ſenſe of this word (proof) that is, by a Jury of twelve men, but (reaſonably,) that is, by Vervels, or by marks, or by other proof to the Sherif.

¶ And if any ſteal any Hawk, &c.] The concealing and carrying away of the Hawk, not bringing the ſame to the Sherif according to this Ordinance, is adjudged a ſtealing by this Act. And yet if a man finde goods, and conceal or deny them, it is no felony.

14 El.Dier 307. Fines caſe. Lib.7.fo.17. in caſe de Swans.

¶ As of a thief that ſtealeth a horſe.] But yet by the Common law one hath not as good and abſolute a property in Hawks, being feræ naturæ, and reclaimed for delight and pleaſure (for they may become wild again, and return to their naturall liberty) as in a horſe, or any other thing of profit: but the concealing and carrying away of the Hawk reclaimed, being found

found was no felony before this ſtatute, no more then any thing of profit, becauſe the party came to the Hawk by finding. See more hereof in the Chapter of Larceny. A Hawk that is not reclaimed is nullius in bonis, but occupanti conceditur, and he that firſt getteth the Hawk enjoyeth it.

In this Act Four things are to be obſerved. Firſt, that the Sheriff muſt make proclamation in all the good townes of the County that he hath ſuch a Faulcon in keeping. Secondly, if none come to challenge the Falcon within four months, if the finder be under the degree * of a Gentleman (which here is called un ſimple home) the Sheriff ſhall have the Falcon, paying reaſonable coſts, &c. Thirdly, if the finder be a Gentleman, and no challenge by the owner within four months, then he ſhall have the Faulcon, paying reaſonable coſts, &c. Fourthly, it is to be obſerved, that in theſe two latter branches, the laſt printed book hath this word (Hawk:) but in the originall, and all the other printed books, the word is (Falcon) under which word, all the reſt mentioned in this Act are included.

For this offence of felony the offender ſhall have the benefit of his Clergy, for at the time of the making of this Act he that had ſtoln a horſe ſhould have had his Clergy. See Stanf. Pl. Coron. fo. 37.

* Who ſhall be accounted in law a Gentleman; See the ſecond part of the Inſtitutes the ſtatute of Additions. 1 H.5.c.5. See before c.23. 3 Jac.ca.4.Verb. And that if any Gent.

CAP. XXXV.

Congregations, &c. by Maſons in their generall Chapters, &c.

IT is ordained and eſtabliſhed that no congregations and confederacies ſhall be made by Maſons in their generall Chapters and aſſemblies, whereby the good courſe and effects of the ſtatutes of Labourers are violated and broken, in ſubverſion of law; and if any be, they that cauſe ſuch Chapters and congregations to be aſſembled and holden, ſhall be adjudged felons. 3 H.6.ca.1.

The cauſe wherefore this offence was made felony, is, for that the good courſe and effect of the ſtatutes of Labourers were thereby violated and broken. Now all the ſtatutes concerning Labourers before this Act, and whereunto this Act doth refer are repealed by the ſtatute of 5 Eliz. cap. 4. whereby the cauſe and end of the making of this Act is taken away, and conſequently this Act is become of no force or effect: for ceſſante ratione legis, ceſſat ipſa lex. And the indictment of felony upon this ſtatute muſt contain, that thoſe Chapters and Congregations were to the violating and breaking of the good courſe and effect of thoſe ſtatutes of Labourers, which now cannot be ſo alledged, becauſe theſe ſtatutes be repealed. Therefore this would be put out of the charge of Juſtices of Peace written by * Maſter Lambard.

23 E.3.de ſervientibus ca.1.&c. 25 E.3.De ſervientibus c.1.&c. 5 El ca.4.

Ceſſante cauſa ſeu ratione legis ceſſat ipſa lex. 14 H.7.11. Per Fineux ſimile 27 H.8.4.b. Aide

ſimile 10 E.3.8. Account per Shard. 26 H.6. Examination 14. * Lambard pag.127. Vide Stanf. 37.b.

CAP.

CAP. XXXVI.

Of Felony by bringing in of Buls of Excommunication, &c.

13 R. 2. Stat. 2. cap. 3.

IF any man bring or ſend into this Realm, or the Kings power, any Sommons, Sentence, or Excommunication againſt any perſon of what condition that he be, for the cauſe of making motion, aſſent, or execution of the ſtatute of Proviſors, he ſhall be taken, arreſted and put in priſon, and forfeit all his lands and tenements, goods and chattels for ever, and incur the pain of life and member. And if any Prelate make execution of ſuch Sommons, Sentence, or Excommunication, that his Temporalties be taken, and abide in the Kings hand till due redreſſe and correction be thereof made. And if any perſon of leſſe eſtate then a Prelate, &c. make ſuch execution, he ſhall be taken, arreſted, and put in priſon, and have impriſonment, and make fine and ranſome by the diſcretion of the Kings Councell.

By the Common law when any perſon, either Eccleſiaſticall or Temporall, ſhould by pretert of Forain power impugne or attempt to fruſtrate any of the lawes of the Realm, there lyeth a Writ called Ad jura regia: if it were by an Eccleſiaſticall perſon beneficed within this Realm, then the writ is,

Regiſt. fo. 61. b. Rex, &c. Salutem. Turbamur, nec immerito, & movemur dum illos qui ſub noſtro degunt dominio, & ibidem beneficiis & redditibus honorantur, quo prætextu in defenſione, & tuitione jurium Regiæ Coronæ noſtræ ipſos nos aſſiſtere condeceret, eadem jura erectis contra nos cervicibus conſpicimus ſatagentes pro viribus impugnare, &c.

Ibidem 60. b. The generall writ is, Rex, &c. Ad jura Coronæ noſtræ integra & illæſa pro viribus conſervanda, eo amplius curam & operam adhibere nos convenit ſtudioſam, quòd ad hoc ex debito aſtringimur vinculo juramenti, & alios conſpicimus, ad ipſorum jurium enervationem anhelare: and particularly againſt Proviſions. So as Proviſions, &c. were, as by theſe writs it appeareth, againſt the Common law of the Realm, but ſufficient puniſhment was not thereby inflicted: therefore this, and other ſtatutes were made.

Ibid. 61. b. & 62. And here it is worthy of conſideration, how the lawes of England are not derived from any forain law, either Cannon, Civil, or other, but a ſpeciall law appropriated to this Kingdome, & moſt accommodate & apt for the good government thereof, under which it hath wonderfully flouriſhed, when this law hath been put in due execution: and therefore as by ſituation, ſo by law it is truly ſaid,

* Diviſos { orbe & / legibus. Et penitus toto * diviſos orbe Britannos.

¶ If a man.] Though theſe words be generall, yet they extend not to Eccleſiaſticall perſons, becauſe there is ſpeciall proviſion for them after in the Act.

¶ Any Sommons, Sentence, or Excommunication.] Hereby are prohibited the Popes Buls of any ſentence or excommunication, &c. and proces of Sommons.

It

It appeareth by our Books that the bringing of any Bull of Excommunication into the Realme against a subject, was against the Common Law of England, in respect it gave way to forraine authority. And so it was holden in the time of E. 1. and E. 3. &c. long before this Act, and ever since.

11 E.3. Certif. 6. 30 Ass. p. 3. 19 E.3. Quare non admisit. 7. Brook. Premunire 10. 11 H.4.69. 76. 14 H.4. 14. 7 E.4.14. 20 H.6.1. 35 H.6.42. F.N.B.64.f. Lib.5. fo.12. in Caudries case.

¶ Or execution of the said statute of Provisors.] viz. 25 E. 3. de Provisoribus. See 25 E. 3. cap. 22. 27 E.3. cap. 1. 38 E. 3. stat. 2. cap. 1. &. 4.

¶ Incurre the paine of life and member.] *a* That is, of felony as hath been often said before. This punishment is altered by the statute of 13 Eliz. cap. 2. as hereafter in this Chapter shall appeare.

a W. 2. cap. 24. 1 E.2. de Frang. prisonam. 28 E.3. cap. 3. 13 R.2. stat. 2. ca. 3 9 E.4.26. Br. cor. 103.

¶ And if any Prelate make execution, &c.] This and the next following branch extend to Ecclesiasticall persons. The punishment in both these branches, and in the former also is altered by the statute of 13 Eliz. cap. 2. For thereby this offence is made High Treason, *b* as well in persons Ecclesiasticall, as temporall: which Act, and the cause of the making thereof you may reade in the case De Jure Regis Ecclesiastico, ubi supra.

b Lib. 5. f. 35, 36, &c. De jure Regis Eccles.

CAP. XXXVII.

Of Felony in receiving a Jesuite, Seminary Priest, &c.

EVery person which shall wittingly and willingly receive, relieve, comfort, or maintaine any Iesuite, Seminary Priest, or other Priest, Deacon, or Religious, or Ecclesiasticall person (made by authority from the See of Rome since the Feast of Saint *John Baptist*, An. 1 *Eliz.* borne within this Realme) being at liberty and out of hold, knowing him to be a Iesuite, &c. shall for such offence be adjudged a felon without benefit of Clergie.

27 Eliz. cap. 2.

Clergie taken away.

The cause of the making of this statute of 27 Eliz. against Iesuites and Seminary Priests, &c. and their receivers, you may reade at large, Lib. 5. fol. 38. 39. in the case De jure Regis Ecclesiastico.

CAP. XXXVIII.

Of Felony in Recuſants concerning Abjuration.

35 Eliz. cap. 1. IF any Recuſant (other then a Popiſh Recuſant or a Feme Covert) which by the tenor and intent of this Act is to be abjured, ſhall refuſe to make abjuration, or after ſuch abjuration made ſhall not goe to ſuch haven, and within ſuch time, as is by this Act appointed, and from thence depart out of the Realme, according to this preſent Act, or after his departure ſhall returne into any of her Majeſties Realmes or Dominions, without her Majeſties ſpeciall licenſe in that behalfe firſt obtained; that then every ſuch perſon ſo offending, ſhall be adjudged a Felon.

If any offender againſt this Act before he or they be required to make abjuration, repaire to ſome Pariſh Church, on ſome Sunday or Feſtivall day, and then and there heare Divine Service, and make ſuch ſubmiſſion as by the Act is preſcribed: then the ſaid offender is cleerly to be diſcharged.

The offender ſhall forfeit his goods and chattels, and his lands during his life only, the offence ſhall worke no loſſe of dower or corruption of blood, and the heire to inherit. The offender ſhall not have the benefit of his Clergie.

CAP. XXXIX.

Of Felonie in Egyptians, &c.

1 & 2 Ph. & Mar. cap. 4. 5 Eliz. cap. 20. IF any outlandiſh people, calling themſelves, or being called Egyptians, ſhall remaine in this Realme, or in Wales, one moneth, at one or ſeverall times: and if any perſon being fourteene yeares old, which hath been ſeen or found in the fellowſhip of ſuch Egyptians, or which hath diſguiſed him or her ſelfe like to them, ſhall remaine here or in Wales by the ſpace of one moneth, either at one or ſeverall times, it is Felony.

The offender ſhall not have the benefit of his Clergie.

CAP.

CAP. XL.

Of Felonie in dangerous Rogues.

IF any dangerous Rogue that was baniſhed the Realme or adjudged perpetually to the Gallies, have returned into the Realme without lawfull licenſe or warrant, it is felony: the felony to be tried where the offender is apprehended. 39 Eliz. cap. 4. 1 Jac. cap. 7. 25

The offender may have the benefit of his Clergie.

If any Rogue after he hath been branded in open Seſſions with a Roman R. upon the left ſhoulder, or ſent to the place of his dwelling where he laſt dwelt by the ſpace of a yeare, or the place of his birth, to be placed in labour, have offended againe in begging, or wandering contrary to the ſaid Statutes, it is felony, to be tried in the County where the offender ſhall be taken. 39 Eliz. cap. 4. 1 Iac. cap. 7.

The offender againſt this branch ſhall not have the benefit of his Clergie.

Mendicus non erit inter vos, There ſhall be no begger among you. Deut. ca. 15. v. 4.

Ordeine fuit que les povres fuiſſent ſuſteinus per les Parſons, Rectors, & les Parochians ey que nul ne moruſt per default de ſuſteinance. Mirr. cap. 1. § 3. Inter les Art. per viels Royes ordeins.

See an ancient Ordinance in 50 E. 3. concerning Ribands and ſturdy Beggers, that they be driven to their occupations or ſervices, or to the place from whence they came. Rot. Par. 50. E. 3. nu. 61. Brit. 49. b.

CAP. XLI.

Of Felonie by Forgerie in the ſecond Degree.

IF any perſon or perſons being once condemned of any of the forgeries mentioned in the Act, ſhall after ſuch his, or their condemnation, eft-ſoones commit or perpetrate any of the ſaid offences in forme in the ſaid Act mentioned, that then every ſuch ſecond offence ſhall be adjudged felony. But no attainder of this felony ſhall extend to take away dower, nor to corruption of blood, or diſheriſon of the heire. 5 Eliz. cap. 14.

In 43 Eliz. Markham was attainted of felony upon this branch in the Kings Bench for a ſecond forgery of many of the Mannors & lands late of Sir Thomas Greſham Knight, and was executed therefore. Markhams caſe coram Rege. 43 Eliz.

* This felony is to be heard and determined before Juſtices of Oier and Terminer, and Juſtices of Aſſize in their Circuit. And albeit that Juſtices of Peace have power to heare and determine felonies, treſpaſſe, &c. yet are they not included under the name of Juſtices of Oier and Terminer: for Juſtices of Oier and Terminer are knowne by one diſtinct name, and Juſtices of Peace by another. But the Juſtices of the Kings Bench are Juſtices of Oier and Terminer within this Statute. Hil. 30 Eliz. coram Rege. Lib. 9. fo. 118. b. Smiths caſe. 3 Mar. Br. tit. Oier & Term. 8.

The offender ſhall not have the benefit of his Clergie.

See hereafter in the expoſition of this ſtatute for the firſt offence, where incidently there ſhall be more ſaid concerning the ſecond offence.

CAP. XLII.

Of Felony for conveying of any Sheep alive out of the Realm in a ſecond degree.

8 El. cap. 3. See the ſtatute of 3 H. 6. cap. 2.

NO manner of perſon ſhall bring, deliver, ſend, receive, or take, or procure to be brought, delivered, ſent, or received into any ſhip, or bottome any Rams, Sheep or Lambs, or any other Sheep alive, to be carried and conveyed out of this Realm of England, Wales, or Ireland, or out of any of the Queens dominions, upon pain that every ſuch perſon, their aiders, abetters, procurers, and comforters, ſhall for his and their firſt offence, forfeit all his goods, and ſuffer impriſonment one whole year without bayl or mainprize; and at the years end in ſome market town in the fulneſſe of the market have his left hand cut off, &c. And that every perſon eſtſoons offending againſt this ſtatute ſhall be adjudged a Felon, &c.

His left hand cut off.

But this Act ſhall not extend to any corruption of blood, or loſſe of Dower. This felony is to be heard and determined before Juſtices of Oier and Terminer, Juſtices of Gaol-Delivery, and Juſtices of Peace. And the offender may have the benefit of his Clergy, as well in caſe of the cutting off his hand as in caſe of felony. See Stanford 37. b.

CAP. XLIII.

Of Felony in ſervants that imbeſill their Maſters goods after their deceaſe.

33 H. 6. cap. 1.

IF any of the houſhold ſervants of any perſon ſhall after the deceaſe of their Lord or Maſter violently and riotouſly take and ſpoil the goods which were their ſaid Lords or Maſters, and the ſame diſtribute amongſt them, that upon full information [a] to the Chancelour of England for the time being by the [b] Executors or two of them, of ſuch riot, taking, or ſpoil made, the Chancelour by the advice of the Chief Iuſtices, and Chief Baron, or two of them, ſhall have power to make ſo many and ſuch writs to be directed to ſuch Sherifs, as to them ſhall ſeem neceſſary, to make open proclamation in ſuch ſort, as by the Act is preſcribed, to appear in the Kings Bench, &c. and if any ſuch writ be retorned, &c. then if the ſaid perſon or perſons make default, then he or they making default ſhall be [c] attainted of felony.

a This extends to the Lord Keeper of the Great ſeal.
b This extends to the Adminiſtrators, and alſo, if there be but one Executor or Adminiſtrator.
c Attainted by force of this Act of Parliament upon default.

The offenders ſhall have the benefit of their Clergy.

See the like many times in the Parliament Rolls. Rot. Parl. 15 H. 6. nu. 14. & 15. Rot. Parl. 18 H. 6. num. 28.

CAP.

CAP. XLIV.

Of Felony in ſervants that imbeſill their maſters goods committed to their truſt above forty ſhillings.

EVery ſervant to whom any Caskets, Jewels, money, goods, or Cattels of his or their maſter, or miſtris, ſhall be delivered to keep, that if any ſuch ſervant or ſervants withdraw him or them from their ſaid maſters or miſtriſſes, and goe away with the ſaid Caskets, Iewels, money, goods or cattels, or any part thereof to the intent to ſteal the ſame, contrary to the truſt and confidence in him or them put, &c. Or elſe being in ſervice of his ſaid maſter or miſtris, without the aſſent and commandment of his maſter or miſtris, imbeſill the ſame or any part thereof, or otherwiſe convert the ſame to his own uſe, with like purpoſe to ſteal it: If the Caskets, Iewels, money, goods or cattels be of the value of forty ſhillings or above, ſhall be deemed and adjudged Felony. 21 H.8.ca.7. 27 H.8.ca.17. 28 H.8.ca.2. 1 E.6.ca.12. 5 El.ca.10.

Concerning the value, (to ſpeak it once for all) Tantum bona valent, quantum vendi poſſunt.

This Act extendeth not to any Apprentice or Apprentices, nor to any ſervant within the age of eighteen years, at the time of the offence committed.

Vide Dier 25 H.8. fol. 5. Dier 25 H.8.f.5.

By the ſtatute of 27 H.8. the offender was ouſted of his Clergy, but that Act is repealed by 1 E.6. cap. 12. So as at this day the offender may have the benefit of his Clergy. 1 E.6.ca.12.

¶ Shall be delivered by his or their maſter or miſtris.] If the maſter deliver an obligation to his ſervant to receive the money thereby due, and the ſervant receive the money of the obligee, and goeth away with the ſame with intent to ſteal the ſame, this is no offence within this ſtatute, becauſe he had not the money of the delivery of his maſter: and if he had gone with the obligation with intent, ut ſupra, it had been alſo out of this Act, becauſe it was a choſe in Action. So if the maſter deliver to his ſervant wares or merchandizes to ſell, and ſelleth the ſame and goeth away with the money as before, this is no offence within this ſtatute for the cauſe aforeſaid. See Stanford 37.b. Dier 26 H.8. fo.5.a.& b. See the form of the Indictment upon this ſtat. Lamb. Inter Præſidentes.

CAP.

CAP. XLV.

Of Felony to cut down or break up the Powdike in Marſhland in Norff.

22 H.8.ca.11. 2 & 3 Ph.& Mar. cap.19.

EVery perverſe and malitious cutting down and breaking up of any part of the new Dike called the Powdike in Marſhland in the County of Norff. or of the broken Dike called Oldfield Dike by Marſhland in the Iſle of Ely in the County of Cambridge, or of any other Bank being parcell of the Rinde, and uttermoſt part of the ſaid Country, is adjudged Felony.

The Juſtices of Peace have power to enquire of, and to hear and determine this felony. The offender may have the benefit of his Clergy.

Some ſay that this is a private Act, but it is publicum in privato, for the danger is publike though the place be private, and doth concern multitudes of people, and the Sea is ſuch an immenſe creature, as who can withſtand it without length of time, infinite dammage, and loſſe, and extream charge and coſt?

43 El.cap.13. * See before cap.12.fo.61,62. 3 H.7.cap.2. Vide 1 H.5.c.6. ſimile de Gales. * Blackmail is explained by the Act it ſelf.

See the ſtatute of 43 El. cap. 13. whereby in the Counties of Cumberland, Northumberland, Weſtmerland and the B. of Dureſme * carrying away or detaining of any perſon againſt his will, or impriſoning him or them to ranſome them or to ſpoil them, upon deadly feud or otherwiſe, or ſhall receive or carry * Black mail, or give Black mail for protection, &c. is made felony without benefit of Clergy.

CAP. XLVI.

Of one of the Grand Enqueſt being one of the Indictors of any perſon or perſons of treaſon or felony, and diſcover openly what perſons were ſo indicted, &c.

Stanf.fo.36.a.

THis by ſome opinion in our books was holden for treaſon, or felony, and hereof divers reaſons were yeelded.

Firſt, that ſuch diſcovery was againſt his oath, but that could not be the reaſon, for periury was neither treaſon nor felony.

Secondly, others did hold, that by this diſcovery the parties indicted of treaſon or felony might flee or eſcape, but that can be no reaſon; for this diſcovery without more, can neither make him principall nor acceſſory.

18 E.3.Cor.272. 27 Aſſ.p.63. Georges caſe.

Thirdly, others that endeavour to conſeſſe and avoid the Authorities in this caſe in law, are of opinion, that in thoſe times the intent of a man, in criminalibus, was much reſpected, in as much as In criminalibus voluntas reputabatur pro facto, and that by this open diſcovery, &c. his intent appeared, that they might flee or eſcape. And now it is agreed on all parts, that at this

day

day ſuch diſcovery is neither treaſon nor felony: and the rather, for that no perſon ever died for ſuch diſcovery. In Georges caſe, in anno 27 Lib. Aſſ. upon his Indictment he was acquited. But certaine it is, that ſuch diſcovery is accompanied with perjury, and a great miſpriſion to be puniſhed by fine and impriſonment.

CAP. XLVII.

Of Larceny or Theft by the Common Law.

HAving thus far proceeded, we are now come to Larceny, which commeth from Latrocinium, and from Latrocinie, by contraction, or rather abuſe, to Larceny.

The Mirror firſt deſcribeth Larceny, and then explaineth it. Larcine eſt priſe d'autre moeble corporelle trecherouſment contre la volunt de celuy a q̄ il eſt p̄ male egaigne de la poſſeſſion, ou del uſe. Then doth he explaine and ſhew the reaſon of the principall words thereof. Mirror.cap.1. § 10. De Larcenie.

Priſe eſt dit, car baile neſt my title de laroun, ne livery en le caſe.

Moeble corporelle eſt dit pur ceo q̄ en biens nient moebles, ou nient corporels, ſicome de tre, rents, & des Advowſons de Eſgliſes, ne ſe fait nul larcenie.

Trecherouſment eſt dit pur ceo q̄ ſi leſloignour entende les biens eſtre ſiens, & que il les poet bien prender, en tiel caſe ne ſe fait my ceſte peche, nec en caſe ou len prent l'autrui p̄ la ou len entend, que il pleiſt al ſeignior des biens, que il les prendera, mes a ceo covient enſeigner apparant preſumption & evidence.

Et ſciendum, quod furtum eſt, ſecundum leges, contrectatio rei alienæ frandulenta, cum animo furandi, invito illo domino, cujus res illa fuerat. And then he alſo explaineth it. Cum animo dico, quia ſine animo furandi non committitur. Bracton uſeth not the word latrocinium, but furtum, and ſo doth Glanvile. See Britton a whole Chapter de Larcyns. And Fleta hath it thus, Eſt autem furtum contrectatio rei alienæ frandulenta cum animo furandi, invito Dño cujus res illa fuerit, following Bracton totidem verbis. Theſe deſcriptions are generally of Theft, comprehending Robbery, Burglary, when any thing is taken, & all other latrocinies. But here Larceny for diſtinction ſake is taken in a narrower ſenſe, viz. for ſingle theft or thievery, and may be deſcribed thus. Bracton lib.3. fol.150. Glanvil.lib.7.c.17 & lib.10.cap.15. Britton cap.15. de Larcyns.fo.22 Fleta lib.1.ca.36.

Larceny, by the Common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the meere perſonall goods of another, neither from the perſon, nor by night in the houſe of the owner. Larcenie defined.

Now let us peruſe the principall parts of this deſcription.

¶ Felonious taking] Firſt it muſt be felonious, id eſt, cum animo furandi, as hath been ſaid. Actus non facit reum, niſi mens ſit rea. And this intent to ſteale muſt be when it commeth to his hands or poſſeſſions: for if he hath the poſſeſſion of it once lawfully, though he hath animum furandi afterward, and carrieth it away, it is no Larceny: but this receiveth ſome diſtinction, as hereafter ſhall appeare. See tit. Piracy, &c. Butlers caſe, 28 Eliz.

Secondly, it muſt be an actuall taking: for an Indictment, Quod felonice abduxit equum, is not good, becauſe it wanteth cepit. By taking, and not bailment or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil. Furtum non eſt ubi initium habet detentionis per dominum rei. 2 E.3.1. Glanvil lib.10. cap.13.

But herein the Law doth diſtinguiſh. For if a Bale or Pack of merchandize be delivered to one to carry to a certaine place, and he goeth away with the whole pack, this is no felony: but if he open the pack, and take any thing out animo furandi, this is Larceny. Likewiſe if the Carrier carry it to the place appointed, and after take the whole pack animo furandi, this is Larceny alſo: for the delivery 13 E.4.9.

very had taken his effect, and the privity of the bailement is determined. And so it is of a Tun of Wine, or the like, mutatis mutandis.

Charge. Also there is a diversity betweene a possession, and a charge; for when I deliver goods to a man, he hath the possession of the goods, and may have an Action of trespasse, or an Appeale, if they be taken or stolne out of his possession. But my Butler or Cook, that in my house hath charge of my Vessell or Plate, hath no possession of them, nor shall have an Action of trespasse or an Appeale, as the Bailee shall: and therefore if they steale the plate or vessell, it is Larceny. And so it is of a Shepherd, for these things be In onere, & non in possessione Promi, Coci, Pastoris, &c.

3 H.7.12. 21 H.7.15.

13 E.4.9. If a Taverner set a piece of plate before a man to drink in it, and he carry it away, &c. this is Larceny: for it is no bailement, but a speciall use to a speciall purpose.

Speciall use.

22 Ass.pl.99. 22 E.3.cor.265. Thirdly, nor by Trover or finding. If one lose his goods, and another finde them, though he convert them, animo furandi, to his own use, yet is it no Larceny, for the first taking is lawfull. So if one finde treasure trove, or waife, or stray, and convert them ut supra, it is no Larceny, both in respect of the finding, and also for that Dominus rerum non apparet.

See cap. de Treason. Verb. quant. home, &c. Et cap. Murder. 27 Ass.40. 2 E.3.cor.160. Lex Inæ cap.50. accord. Stanf.26.c. 15 E.2.Cor.383. ¶ Felonious] implyeth, that though the taking be actuall, yet must it be done by such persons as may commit felony. A mad man that is non compos mentis, or an infant that is under the age of discretion, cannot commit Larceny, as in another place we have said.

A Feme covert committeth not Larceny, if it be done by the coertion of her husband: But a Feme covert may commit Larceny, if she doth it without the coertion of her husband: and there it appeareth, that a man may be accessary to his wife, but the wife cannot be accessary to her husband, though she know that he committed Larceny, and relieve him, and discover it not: for by the Law Divine, she is not bound to discover the offence of her husband.

Mic. 37 E.3. coram Rege. Rot. 83. Lincolne. Felons came to the house of Richard Dey, and Margery his wife; the wife knew them to be felons, but the husband did not, and both of them received them, and entertained them, but the wife consented not to the felony. And it was adjudged, that this made not the wife accessary, Quia ipsa in vita mariti sui de aliquo recepramento in præsentia viri sui, cui contradicere non potuit, occasionari non debet.

Bracton lib.3. fol.151.b. Uxor furi desponsata non tenebitur ex facto viri, quia virum accusare non debet, nec detegere furtum suum, nec feloniam, cum ipsa sui potestatem non habet, sed vir.

Briton.cap.24. fo.47. La feme ne quedent al felon poitdire q̃ tout seavoit ele del mauvaste son baron, pur ceo ne le poet ele my encuser, ne devoit, tant come ele fuit de luy covert, &c.

Fleta lib.1. ca.36. Uxor autem furis non teneatur pro delicto viri, pœna enim suos debet tenere authores, uxor autem virum accusare non debet, nec feloniæ suæ consentire, &c.

¶ Felonious and fraudulent taking.] If a man seeing the horse of B. in his pasture, and having a minde to steale him commeth to the Sheriffe, and pretending the horse to be his, obtaineth the horse to be delivered unto him by a Replevyn, yet this is a felonious and fraudulent taking, as it was resolved by the Judges, as Catlin Chiefe Justice reported in the Kings Bench, Pasch. 15 Eliz. for the Replevyn was obtained in fraudem legis.

Pasch.15.Eliz. Vide statutum.

Carrying away.] For the Indictment saith, felonice cepit & asportavit. The removing of the things taken, though he carry not them quite away, satisfieth this word asportavit. As if a guest take the coverlet or sheets of his bed, and rising before day, take the Coverlet or sheets out of the chamber where he lay, into the Hall, to the intent to steale them, and went to the stable to fetch his horse, and the Ostler apprehended him, and this was adjudged Larceny: and the coverlet or sheets were carried away being removed from the Chamber to

22 Ass.pl.39.

the

the hall, albeit they were ſtill in the houſe of the owner.

So if a mans horſe be in his cloſe, and one taketh him, and as he is carrying him away, he is apprehended, before he getteth out of the cloſe, yet this is ſufficient to make it Larceny. Juſtice Dalizons Report.

¶ Of mere perſonall goods.] It is ſaid (mere) for though they be perſonall goods, yet if they ſavour any thing of the realty, no Larceny can be committed of them; As any kind of corn or grain growing upon the ground is a perſonall chattell, and the Executors of the owner ſhall have them, though they be not ſevered, but yet no larceny can be committed of them, becauſe they are annexed to the realty. So it is of graſſe ſtanding on the ground, or of Apples, or any other fruits upon trees, or buſhes, or of woods growing; but if the owner cut the graſſe, or gather the fruit, or cut the wood, then larceny may be committed of them. *1 Hawk. 98. Wood Inſt. 366* 12 E.3.Cor.199. 22 E.3.Ibid.256. lib.4. fo.19.

So it is of a box or cheſt with Charters, no larceny can be committed of them, becauſe the Charters concern the realty, and the box or cheſt though it be of great value, yet ſhall it be of the ſame nature the Charters be of: & omne majus dignum trahit ad ſe minus. 10 E.4.14. Lib.8.fo.33.b. Caleys caſe.

No Larceny can be committed by taking, and carrying away of a ward, or of a villain, becauſe they are in the realty.

It appeareth by all our ancient Authors ubi ſupra, and by the ſtatute of W.1. that there is Grand Larceny, and Petit Larceny, diſtinguiſhed ſo by the value: for if the perſonall goods ſtoln amount to above the value of twelve pence, then is it grand larceny, and if it be under the value of twelve pence, then it is petit larceny, for which he ſhall forfeit all his goods, and ſuffer ſome corporall puniſhment, as whipping, &c. W.1.ca.15. See the expoſition thereof. 27 H.8. 22. Cornū forisfacere or perdere Sax. *tholiz his hide* is to be whipt. Mirror ca.4.§. De crime de robbery.

And this was the ancient law before the Conqueſt, for the Mirror ſaith, Et tout ſoit que la ley ne eyt regard forſque al ceures des peuchers nequident limit le quantitie del robbery & larceny en ceſt manner, ceſtaſſavoir que nul ad judgement de la mort, ſi non larceny. &c. ne paſſont 12 deniers de ſterlings.

A man hath a mere property in ſome things that are tame by nature, and yet in reſpect of the baſenes of their nature, a man ſhall not commit any larceny, great or ſmall, though he ſteal them, as of maſtifs, bloud-hounds, or of other kind, dogs or of cats, nor of ſome things that be [a] wild by nature, and made tame, as bears, fores, apes, monkies, polcates, ferrets, and the like, and yet no manner of felony can be committed on them, in reſpect of their wild and ſavage nature, and therefore no perſon ſhall die for them: and likewiſe it is of their whelps, or Calves, or young; for it is a rule in law, that if no felony can be committed of any thing that is ferum natura, and of age being reclaimed, or made tame, that no felony can be of the young in the neſt, kennell or den. Lib.7.fo.18. In caſe de Swans. [a] Vide verb (of another) next following. 12 H.8.39. 14 H.8.3.4. 18 H.8.2. 2 E.2.diſtres 20 leveret. 2 E.2. Avowry.182.ferret. 38 E.3.10. 47 E.3.10. 5 H.5.1. 9 H.6.2. F.N.B.87.2. & 88 I. 86.l.

[b] So as a man may have property in many things, and yet in reſpect of their nature there can be no felony of them. On the other ſide, of ſome things that be feræ natura, being reclaimed, felony may be committed in reſpect of their noble and generous nature and courage, ſerving ob vitæ ſolatium of Princes, and of noble, and generous perſons, to make them fitter for great employments: As all kind of Faulcons, and other Hawks, if the party, that ſteals them know they be reclaimed. [b] Mirror c.1.§.10. Dier 14 El.306, 307. 18 E.4.8. 16 E.4.11. 14 H.8.4.

¶ Of another.] [c] No larceny can be committed of wild beaſts, or of fowls that be wild, or of fiſhes that be at their naturall liberty in rivers, or great waters, becauſe theſe be nullius in bonis: but larceny may be committed of young pigeons in dovehouſes, or of young hawks in the neſt. But if any perſon upon the ground of any other, doe take the egs of any Faulcon, Gothawk, Lanner, or Swan out of the neſt, this is not felony, [d] but he ſhall be impriſoned by the ſpace of a year and a day, and fined at the Kings will, the one half to the King, and the other to the owner of the ground. But larceny may be committed of the egs of ſuch as be domitæ natura, as of Hens, Turkies, Pehens, Vide before. 37 E.3.fo.37. F.N.B.86.l. [c] 18 H.8.2.b. Doct.& Stu.9.b. Britton 74,75. Bract.l.2.fo.9. 8 E.4.5. [d] 11 H.7.ca.17. 31 H.8.ca.12.

and the like. [a] And larceny may be committed of fiſhes in a trunk or pond, becauſe they are not at their naturall liberty, but as it were beaſts in a pownd.

[b] But if ſuch as be wild, that ſerve for the food of man, be made tame, as Deer, wild Boare, Conies, Cranes, Pheſant, Partridge, or the like, larceny may be committed of them, ſo as he that ſtealeth them know that they be tame. But the Deer, &c. being wild, yet when he is killed larceny may be committed of the fleſh, and ſo of Pheſant, Partridge, or the like: And ſo note a diverſity between ſuch beaſts as be feræ naturæ, and being made tame ſerve for pleaſure only, and ſuch as be made tame and ſerve for food, &c. which diverſity being not obſerved, hath made many men to erre.

A man may be indicted, Quare bona capellæ in cuſtodia, &c. and ſo in time of vacation, bona domus Eccleſiæ.

At the Aſſiſes at Leiceſter, in Lent, Anno 10 Jac. the caſe was this, one William Hain had in the night digged up the graves of divers ſeverall men, and of one woman, and took the winding ſheets from the bodies, and buried the bodies again: and I adviſing hereupon for the rareneſſe of the caſe, conſulted with the Judges at Serjeants Inne in Fleetſtreet; where we all reſolved, that the property of the ſheets was in the Executors, Adminiſtrators or other owner of them, for the dead body is not capable of any property, and the property of the ſheets muſt be in ſome body: and according to this reſolution, he was indicted of felony at the nert Aſſiſes, but the Jury found it but petit larceny, for which he was whipped, as he well deſerved.

Nota. A felonious taking muſt be of the poſſeſſion, and not of the property removed from the poſſeſſion.

If a man doth bail, or lend his goods to another, although he hath the generall property of them, yet may he commit larceny of them, by the felonious taking and carrying them away, and in judgement of law he is ſaid in this caſe to take the goods of another: for the bailer hath jus proprietatis, and the bailee hath jus poſſeſſionis, or a ſpeciall property.

The wife cannot ſteal the goods of her husband, for they be not the goods of another, for the husband and wife are one perſon in law, Duæ animæ in carneuna.

Vide Stanf. Pl. Coron. fo. 24, 25.

To ſpeak it here once for all, if any perſon be indicted of treaſon, or of felony, or larceny, and plead not guilty, and thereupon a Jury is returned, and ſworn, their verdict muſt be heard, and they cannot be diſcharged, neither can the Jurors in thoſe caſes give a privy verdict, but ought to give their verdict openly in Court.

Macegriefs, fleſhmongers, ſuch as buy and ſell ſtollen fleſh, knowing the ſame to be ſtollen. Vide Lamb. inter leges Edw. Regis fol. 140. b. De Machecariis derived of mace an old word for fleſh, and grief, wrong or injury.

[a] Stanf. 25. c.
12 E. 4. 4.
18 E. 4. 8.
22 H. 6. 59.
43 E. 3. 24.
Vide before, Verb. (Of meer perſonall goods)
3 H. 6. 55.
lib. 5. fo. 104. b.
lib. 7. fo. 16, 17.
[b] 10 E. 4. 14.

7 E. 4. 14.
Stanf. 25.

10 Ja. Regis. Hains caſe. Furtum inauditum.

7 H. 6. 43.

21 H. 6. Cor. 455.
Abbridge daſ. 63.

Britton fo. 71.

CAP.

CAP. XLVIII.

De anno Die & Vasto.

Of the year day and waſt.

HEreof we have treated at large, in the Second part of the Inſtitutes in his proper place upon the Expoſition of Magna Carta cap. 22. where it appeareth, that at this day the King ſhall have but the profits for a year and a day in lieu and ſatisfaction of the waſt which the Common law gave to the King in deſpite and deteſtation of the offence, as there you may read at large: and there it appeareth how neceſſary it is, ancient Authors to be read. all which need not here to be rehearſed: * and that if any ſtatute be made to the contrary of Magna Carta, it ſhall be holden for none. And therefore if Prærogativa Regis anno 17 E.2. cap.ultimo, be contrary thereunto, it is repealed as to the waſt.

Mirrror cap.1. §. 3. & cap.4. §. *Et le roy in remembrance*, &c. Lege quia optime. Glanv.li.7. cap.17. Bracton lib.3.fo. 129.137. Britton c.5. f.14. Fleta lib.1.c.28. § *Cauſa vero*, &c.

17 E.2. Prær. Regis cap. ultimo. Regiſt.165. Mag. Cart.cap. 22. 3 E.3. Cor.356.327.310.290. * 42 E.3.ca.1.

CAP. XLIX.

Of Piracy, felonies, robberies, murders, and confederacies committed in or upon the ſea, &c.

HAving now treated of felonies, &c. that are committed and done upon the land, we will conſider of Piracies, and felonies, &c. done on the ſea, which by an Act of Parliament are to be enquired of, heard, and determined according to the courſe of the Common law, as if they had been done upon the land.

Rot. Parl. 8 H.6.nu.42.

All treaſons, felonies, robberies, murders and confederacies committed in or upon the ſea, or in any other Haven, River, Creek, or place, where the Admirall hath, or pretends to have power, authority, or juriſdiction, ſhall be enquired, tried, heard, determined, and judged in ſuch ſhires, and places in the Realm, as ſhall be limited by the Kings Commiſſion under the Great ſeal in like form and condition, as if any ſuch offence had been committed upon the land, to be directed to the Lord Admirall, or to his Lieutenant, Deputy, or Deputies, and to three or four ſuch other ſubſtantiall perſons, as ſhall be named by the Lord Chancellour of England, for the time being, &c.

28 H.8.ca.15.

Vid. 27 E.3.c.13. del ſtaple. 31 H.6.cap.4. Vide 2 R.3. fo.2. Vide Palaches caſe.

And ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion, or proces by authority of any ſuch commiſſion, ſhall have and ſuffer ſuch pains of death, loſſes of lands, goods and chattels, as if they had been attainted of any treaſon, felony, robbery, or other the ſaid offences done upon the land.

See before in the chap. of Hereſy.

The offenders not to be admitted to have the benefit of Clergy.

The miſchief before this ſtatute was (as it appeareth by the Preamble) that Traitors, Pirates, Theifs, Robbers, Murderers, and Confederators upon the ſea many times eſcaped unpuniſhed, becauſe the Common law of this Realm extended not to theſe offences, but were judged, and determined before the Admirall, &c. after the courſe of the Civill laws, the nature whereof is, that before any judgement of death be given againſt the offenders, either they muſt plainly confeſſe their offences (which they never will do without torture or pains) or by * witneſſe indifferent, ſuch as ſaw their offences committed, &c. which in theſe caſes cannot be gotten but by chance, or very rarely: For this cauſe, the Commons petitioned in [a] Parliament in 8 H.6. that the Juſtices of Peace might enquire of all Piracies: but the Kings anſwer was, That he would be adviſed.

See 40 Aſſ. pl. 25.

* Concerning treaſon, ſee before cap. 2. Verb. *All trials.* fo. 25. 1 E.6. ca. 12. 5 E.6. ca. 11. &c.

[a] Rot. Par. 8 H.6. nu. 42.

This ſtatute requires a conſiderate and juſt interpretation, wherein, for that it concerneth the life of man, the ſafeſt way is, to follow the reſolutions of all the Judges formerly had upon due conſideration of all the parts of this Act, and upon divers conferences, and in the end, when I was Atturney generall, reſolved by them unanimouſly as followeth:

Hil. 2. Ja. Regis. at Serjeants Inne in Fleetſtreet, the reſolution of the Juſtices.

Where divers did in the reign of the late Queen Elizabeth commit Piracy and Robbery upon the high ſea, of divers Merchants of Venice, in amity with the ſaid Queen, and after the Pirats, being not known, obtained a pardon, granted at the Coronation of King James, whereby the King pardoned them all felonies (inter alia) Firſt, that before this ſtatute Piracy, or Robbery on the high ſea was no felony, whereof the Common law took any knowledge, for that it could not be tried, being out of all townes and Comties, but was only puniſhable by the Civill law, as by the Preamble it appeareth; the attainder by which law wrought no forfeiture of lands, or corruption of bloud. Secondly, that this ſtatute did not alter the offence, or make the offence felony, but leaveth the offence as it was before this Act, viz. felony only by the Civill law, but giveth a mean of triall by the Common law, and inflicteth ſuch paines of death, as if they had been attainted of any felony, &c. done upon the land. But yet (as hath been ſaid) the offence is not altered, for in the Indictment upon this ſtatute, the offence muſt be alledged upon the ſea; So as this Act inflicteth puniſhment for that, which is a felony by the Civill law, and no felony, whereof the Common law taketh knowledge. Thirdly, although the King may pardon this offence, yet being no felony in the eye of the law of the Realm, but only by the Civill law, the pardon of all felonies generally extendeth not to it, for this is a ſpeciall offence, and ought to be ſpecially mentioned.

Three points reſolved.

Vide ſimilia. 19 E.3. Cor. 124. 8 H.4.2. 9 E.4.28.

Upon this reſolution theſe conſequents do follow. 1. That by the Attainder upon this Act, though there be forfeiture of lands, and goods, yet there is no corruption of blood. 2. Seeing the offence is not made felony by the laws of this Realm, there can be no Acceſſory of any felony by the laws of the Realm in this caſe, either before or after the offence, becauſe the Principall is no felon by our law, neither doth this Act ſpeak of any Acceſſory. 3. If there be an Acceſſory upon the ſea to a Piracy, that Acceſſory may be puniſhed by the Civill law before the Lord Admirall, but cannot be puniſhed by this Act, becauſe it extendeth not to Acceſſories, nor makes the offence felony. * Laſtly, the ſtatute of 35 H.8. ca. 2. taketh not away this ſtatute for treaſons done upon the ſea for the cauſe aforeſaid. Which reſolution I have thought good to report, becauſe it openeth the windows of this ſtatute.

* See the Fourth part of the Inſtitutes cap. High Treaſon. 5 El. cap. 5. Vide ſupra, cap. High Treaſon Verbo *Ou per ailors.* f. 11.

In Trin. 18 Eliz. in Lord Diers Manuſcript, there is a Quære made, what offence it is to lodge and entertain upon the land a Pirat, knowing him to be a Pirat, and whether this Acceſſory upon the land ſhall be tried by this ſtatute, which is only of principalls in Piracy. And it was thought by the two Chief Juſtices, that the ſureſt way, was to have the Commiſſion in the County where the Acceſſory offended, and there both the Principall and the Acceſſory may be indicted, and tried, Ut per ſtatutum anno 5 & 6 E.6. Quære.

Hæc

Hæc ille. So as this Quære is now cleered by the reſolution of the Judges: and queſtionleſſe the ſtatute (intended of 2 & 3 E. 6. for there is none ſuch in 5 & 6 E. 6.) extendeth only, when a murder or felony is committed in one Countie, and another perſon is acceſſorie in another Countie (as hath been ſaid before:) but in that caſe the offence was committed upon the ſea, and not in any Countie, and ſo out of that ſtatute: and therefore this part of the Manuſcript of the Lord Dier was not thought fit to be printed. 2 & 3 E. 6. ca. 24. Vid. Lib. 2. fo. 93. Binghams caſe. See the Lord Sancars caſe, lib. 9 117, 118.

Butler and other Pirats in Summer vacation robbed divers of her Majeſties ſubjects, upon the Coaſt of Northfolk, upon the High Sea; and brought divers of the goods ſo taken into the County of Northfolke, and there were apprehended with the goods: The queſtion moved to Wray Chiefe Juſtice, and Juſtice Peryam, Juſtices of Aſſiſe in Northfolk, was, whether they might be indicted of felony in Northfolk, as if one ſtoale goods in one County and carry them into another County, he may be indicted in either County? and it was reſolved by them, that they could not be indicted for felony in Northfolk; becauſe the originall taking was no felony, whereof the Common law took conuſance, becauſe it was done upon the ſea, out of the reach of the Common law: and therefore not like the caſe, where one ſtealeth in one County and carrieth the goods into another, for there the originall act was felony whereof the law took conuſance. Anno 28 Eliz. Butlers caſe.

But now let us peruſe the words of the Statute.

¶ Where Traytors, Pirats.] This word Pirat, in Latine Pirata, is derived from the Greek word πειρατης, which againe is fetched from πειρᾶι, a tranſeundo mare, of roving upon the ſea: and therefore in Engliſh, a Pirat is called a Rover and a Robber upon the ſea.

¶ Treaſon, &c.] Note, treaſon done out of the Realme, is declared to be treaſon by the ſtatute of 25 E. 3. And yet at the making of this Act of 28 H. 8. it wanted triall, (as by the preamble of this ſtatute it is rehearſed) at the Common law. And therefore to eſtabliſh a certainty therein, the ſtatute of 35 H. 8. was made, as is alſo ſaid in the expoſition of the ſtatute of 25 E. 3. See Paſch. 43 Eliz. lib. 5. fo. 107. Sir Henry Conſtables caſe.

Before the Statute of 25 E. 3. if a ſubject had committed Piracie upon another (for ſo is the book to be intended upon a fact done before 25 E. 3.) this was holden to be petit treaſon, for which he was to be drawne and hanged: becauſe Pirata eſt hoſtis humani generis, and it was contra ligeanciæ ſuæ debitum: but if an Alien, as one of the Normans, who had revolted in the reigne of King John, had committed piracy upon a ſubject, this offence could be no treaſon, for though he were hoſtis humani generis, yet the crime was not contra ligenciæ ſuæ debitum, becauſe the offender was no ſubject, but ſince the ſtatute of 25 E. 3. this is no treaſon in the caſe of a ſubject. 25 E. 3. cap. 2. 40 Aſſ. p. 25.

¶ Upon the Sea, or in any other Haven, River, Creek, or other place, where the Admirall hath, or pretends to have power, authority, or juriſdiction.] Theſe words [or pretends to have, &c.] are thus to be underſtood, between the High-water-mark, and the Low-water-mark: for though the land be infra corpus comitatus, at the reflow; yet when the ſea is full, the Admirall hath juriſdiction ſuper aquam as long as the ſea flowes: ſo as of one place there is diviſum imperium at ſeverall times: but extend not to any Haven, River, Creek, or other place, that is infra corpus comitatus: for offences there committed were triable by the Common law, and out of the miſchiefe and purvien of this ſtatute: for in the preamble, the ſea is only mentioned, and in the body of the Act it is ſaid, in like forme and condition, as if any ſuch offence had been committed upon the land. 8 E. 2. cor. 399. 46 E. 3. Conuſance 36. Stanf. pl. coron. 51. k. Regiſt. 129. 13 R. 2. ca. 5. 2 H. 4. cap. 11. Pl. com. 37. 2 R. 3. fo. 12. 19 H. 6. 7. 30 H. 6. 6. per Priſott. Forteſcue, ca. 32.

¶ As ſhall be named by the Lord Chancellor of England.] A nomination by the Lord Keeper of the great Seale of England was taken to be

be within this Act by the greater opinion of the Iuſtices: but the ſtatute of 5 Eliz. hath made a Declaration of the Common law concerning the power and authority of the Lord Keeper of the Great Seale, which hath cleared that, and all other like queſtions.

5 Eliz. cap. 18.

¶ To heare and determine ſuch offences after the common courſe of the Lawes of this Land uſed for treaſons, felonies, &c. done and committed upon the Land.] If the offender upon his arraignment before Commiſſioners by force of this Statute ſtand mute, he ſhall have judgement De peyne fort & dure, by force of this generall branch, but it is out of the latter words of the Act, viz. And ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion, or Proces. For he that ſtandeth mute, is not convict of the offence, but ſuffereth for his contumacy. Alſo it is neither by Verdict, confeſſion, or Proces.

Trin. 7 Eliz. Dier 241. the caſe of Brook *alias* Cobham.

For peine fort & dure: See in the ſecond part of the Inſtitutes, in the expoſition upon the Statute of W. 1. cap. 12.

CAP. L.

Of Clergie.

WHat perſon ſhall have his Clergie, for what offences, in what ſuits, who is Judge thereof, and at what time Clergie is to be demanded, you may reade at large in Alexander Poulters caſe in the Eleventh part of my Reports: where alſo is reſolved the diverſity betweene a Clerk convict, and a Clerk attaint; what a Clerk convict which hath his Clergie ſhall forfeit, and at what time; and that none that hath his Clergie allowed ought to make any purgation at this day: and that the King may pardon the burning of the hand, as well in an Appeale, as upon an Indictment.

Lib. 11. fo. 29, 30, &c. Alexander Poulters caſe.

a If the principall hath his Clergie before attainder, the acceſſory either before or after ought to be diſcharged.

Lib. 5. 26, 27. in Caudries caſe.
Vid. Lib. 5. fo. 50. Biggens caſe, & fo. 110. Heſtons caſe.
18 Eliz. cap. 6.
a Lib. 4. fo. 43, 44. Syers caſe.
ib. Bibiths caſe.
2 E. 3. 27.
22 E. 3. Br. cor. 260.
7 H. 4. 16.
10 H. 4 5.
3 H. 7. 1.

b You may adde to the former report a Record in Rot. Clauſ. An. 3 E. 3. m. 2. & 18. That for Sacrilledge the Ordinary may allow Clergie. So as it is in the election of the Ordinary, either to allow or diſallow Clergie in that caſe.

3 H. 7. cor. 53.
4 E. 6. cor. 184.
3 Aſſ. 14. 5 Aſſ. 5.
11 H. 4. 93.
b Rot. cl. 3 E. 3. m. 2. 18.

c See a notable Record Trin. 21 E. 3. coram Rege, Rot. 173. Hertford, that Privilegium Clericale non competit ſeditioſo equitanti cum armis platis, & cotearmuris, per leges Angliæ.

c Tr. 21 E. 3. cor. rege, Rot. 173. Hertford.

d It is provided by the ſtatute of 25 H. 8. that if any perſon be indicted of felony for ſtealing of any goods or chattels in any County, & thereupon arraigned, and be found guilty, or ſtand mute, or challenge peremptory above the number of twenty perſons, &c. they ſhall loſe the benefit of their Clergie, in like manner as they ſhould have done, if they had been indicted and arraigned, and found guilty in the ſame County, where the ſame robbery or burglary was done and committed, if it ſhall appear to the Iuſtices, &c. by evidence given before them, or by examination, that for ſuch robbery or burglary in the ſame Shire where they were committed or done, they ſhould have loſt the benefit of their Clergie by force of the ſaid Statute, viz. of 23 H. 8. cap. 1.

d 25 H. 8. cap. 3. 32 H. 8. c. 3.
Vid. 1 E. 6. ca. 12. 5 E. 6. cap. 10.

¶ Any perſon indicted.] This Act extendeth not to Appeales by Writ or Bill, nor to the Appeales of the Approvors.

e Poulters caſe. Ubi ſupra fo. 31.

¶ Or by examination.][e] By theſe words though the offender confeſſe the Indictment, or ſtand mute, or challenge above twenty, &c. yet if by examination

tion before the Juſtices, the truth of the caſe appeareth, he may be put from his clergie.

¶ By force of the ſaid Statute.] viz. 23 H. 8. So as if for any Burglary or Robbery in one County he were not ouſted of his clergy by the Statute of 23 H. 8. but ſome later Statute, then the Delinquent ſhall have his Clergie in the County where the goods are carried: For example, if the robbery be done in a dwelling houſe, the owner or dweller, his wife, his children, or ſervants then being within the houſe, and put in feare and dread by the ſame, and the goods be carried into another County, he ſhall not have his clergy: but if the robbery in the dwelling houſe be not done with all the circumſtances mentioned in this Act of 23 H. 8. (which circumſtances are not required by the Statue of 5 E. 6. cap. 9.) he ſhall not be ouſted of his Clergie in the other County. And ſo of all like caſes.

Vid. Stanf. pl. cor. fo. 123, &c. De Clergie.

See 1 Jac. cap. 8. Clergie taken from him which do ſtab another that hath not drawne a weapon, nor ſtricken firſt.

CAP. LI.

Of Abjuration and Sanctuary.

ABjuration by the courſe of the Common law may be thus deſcribed. When a man or a woman had committed felony, and the offender for ſafeguard of his or her life had fled to the Sanctuary of a Church or Churchyard, & there before the Coroner of that place within forty dayes had confeſſed the felony, and took an oath for his or her perpetuall baniſhment out of the Realm into a forraine countrey, chooſing rather, Perdere patriam, quàm vitam. But that forraine countrey, into which he was to be exiled, muſt not be amongſt Infidels. And this was the ancient law of this Realme, which was, Prohibemus autem ne Chriſtiana fide tinctus quiſpiam à regno procul amandetur, neve ad eos qui nondum Chriſto fidem adjunxerunt relegetur, ne eorum aliquando fiat animorum jactura, quos propria Chriſtus vita redemit.

Cuſt. de Norm. cap. 24 & 8. Inter leges Inæ, cap. 5.

Inter leges Canuti, fo. 105. ca. 3.

The foundation of the Abjuration was the Sanctuary of the Church or Churchyard. For he or ſhe, that was not capable of this Sanctuary, could not have the benefit of Abjuration. [a] And therefore it is ſaid, that he that committed Sacriledge, becauſe he could not take the priviledge of Sanctuary, could not abjure. For the forme of abjuration ſee the ſtatute of Abjuration, Vet. Magna Carta, part 1. fol. 167. b. The [b] Common law herein was very ancient, and had ſaved the life of many a man; and continued without change untill an Act made in the Twenty ſecond year of H. 8. cap. 14. whereby it was provided, that the party abjured ſhould not be baniſhed out of the Realm, but to ſome other Sanctuary within this Kingdom: [c] and to ſay the troth, Abjuration was exceedingly intricated and perplexed by the ſaid Act of 22 H. 8. cap. 14. and other ſtatutes: For which cauſes all Statutes made before the Thirty fifth year of Queen Elizabeth, concerning abjured perſons, ſtand repealed by the Statute of 1 Jac. cap. 25. whereby the ancient common law concerning abjuration for felony was revived.

[d] But by an Act made in the Twenty firſt year of King James it is enacted, that no Sanctuary or priviledge of Sanctuary ſhould be admitted or allowed in any caſe. By which Act, ſuch abjuration as was at the common law, founded (as hath been ſaid) upon the priviledge of Sanctuary, is wholly taken away: and the Writ in the Regiſter 69. a. De reſtitutione extracti ab Eccleſia is become of no uſe.

[e] And yet the abjuration by force of the Statute of 35 Eliz. ca. 1. before Juſtices

a 8 E. 2. cor. 420.
b Sir Thomas Weyland Chiefe Juſtice of the Common Pleas, Anno 17 E. 1. Vid. Inter placita Parl. An. 19 E. 1. apud Aſhring in Cro. Epiphaniæ
c 50 E. 3. cap. Artic. Cleri, 9 E. 2. c. 10. 1 R. 2. cap. 9. 7 H. 7. cap. 7. 21 H. 8. cap. 2. 22 H. 8. ca. 14. 26 H. 8. cap. 13. 28 H. 8. cap. 1. 33 H. 8. cap. 15. 1 E. 6. cap. 12. 2 E. 6. ca. 2 & 33. 5 E. 6. cap. 10. 13 Eliz. ca. 7. 1 Jac. ca. 25.
d 21 Jac. in the continuance of Statutes, &c.
e 35 El. ca. 1. & 2.

ces of Peace, or Iuſtices of Aſſize, or by force of an Act made at the ſame Parliament, cap. 2. before two Iuſtices of Peace or the Coroner by a Recuſant, remaineth ſtill: becauſe ſuch abjuration hath no dependancie upon any Sanctuary. Which being ſufficient to ſhew how the Law ſtandeth at this day, both concerning Sanctuary and Abjuration, might ſuffice.

But yet he that is deſirous to reade the generall learning of Abjuration the Branch, and of Sanctuarie the Root, let him reade the Mirror, ca. 1. §. 13. & cap. 5. §. 1. where he may reade the right uſe of Abjuration by the ancient law of England. Et inter leges Edwardi nu. 10. Cuſtum. de Normandie cap. 24. Officium coronatorum tit. Abjuration, Raſt. pl. 2. Bracton li. 3. fo. 135. & 136. Britton cap. Abjuration, fo. 24. & cap. Coroners, fo. 7. And Fleta lib. 1. cap. 29. 8 E. 2. Ubi ſupra. 3 E. 3. Coron. 313. 335. 21 E. 3. 17. 29 Aſſ. p. 34. Rot. Pat. 25 E. 3. part. 3. m. 16. Hil. 43 E. 3. Rot. 10. Coram Rege Buck. Hil. 26 E. 3. Coram Rege Rot. 20. Quando aliquis abjuravit regnum, Crux ei deliberat' fuit in manu ſua portanda in itinere ſuo per ſemitas ſuas, & vocatur Vexillum Sanctæ Eccleſiæ. Rot. Parl. 2 R. 2. nu. 28. the right uſe of Sanctuary. 6 H. 4. 2. 8 H. 4. 2. 11 H. 4. 40. 7 H. 6. 8. 27 H. 6. 7. 2 E. 4. 17. 21. 9 E. 4. 29. 12 E. 4. 1, 2. 3 H. 7. Coron. Fitz. 54. 1 H. 7. 23. 25. 8 H. 8. Kelway. 188, 189, 190, 191. Fitz. Iuſtice of Peace, fol. 202. Stanf. pl. cor. cap. Abjuration, fo. 116, 117, &c. Et ibidem Sanctuary, cap. 38. Dier 13 Eliz. fo. 296. Lib. 5. fo. 12. 26. Lib. 6. fo. 9. Lib. Intrat. Tit. Abjuration & Sanctuary.

CAP. LII.

De Hutesio et Clamore.

Of Hue and Cry.

THe one being an expreſſion of the other. For huer in french (unde Hutesium) is to hoot or ſhoute; in engliſh to crie. There be two kinds of Hues and Cryes, the one by the Common law, and the other by ſtatute. Thereupon there are two purſuits, the one for the King, the other for the party by private ſuit.

Hue and Cry by the Common law, or for the King, is, when any felony is committed, or any perſon grievouſly & dangerouſly wounded, or any perſon aſſaulted and offered to be robbed either in the day or night; the party grieved, or any other may reſort to the [a] Conſtable of the town, and acquaint him with the cauſes, deſcribing the party, and telling which way the offender is gone, and require him to raiſe Hue and Cry. And the duty of the Conſtable is, to raiſe the power of the towne, [b] as well in the night as in the day, for the proſecution of the offender, and if he be not found there, to give the next Conſtable warning, and he the next, untill the offender be found, and this was the law before the Conqueſt. [c] Si quis latroni obviam dederit, eumque nullo edito clamore abire permiſerit, quanticunque fuerit latronis vita æſtimata extremum ſolvat denariolum, aut pleno, perfectoque jurejurando de facinore ſe nihil habuiſſe cogniti confirmato. Sin quis proclamantem exaudierit, neque vero fuerit inſequutus, ſuæ in regem contumaciæ (ni omnem criminis ſuſpicionem diluerit) pœnas dato.

In antiquo M.S. Si quis furi obviaverit, & ſine vociferatione gratis eum dimiſit, emendet ſecundum Weram ipſius furis, vel plena lada ſe adlegiet, quòd eum eo falſum neſcivit: ſi quis audito clamore ſuperſedit, reddat Overſameſſa regis aut plene ſe laidiet. Bracton who wrote before any Act of Parliament concerning Hue and Cry, ſaith, Omnes tam milites, quam alii qui ſunt 15 annorum

[a] Rot. Parl. An. 6 E. 3. num. 6. Conſtable of the town to make hue and cry.

[b] 2 E. 4. 8. b. & 9. a.

[c] Inter leges Canuti fo. 110. c. 26. See Inter leges Edw. Conf. ca. 21.

For Overſameſſa, See lib. Rub. cap. 36. Bracton li. 3. fo.

norum et amplius, jurare debent quòd utlagatos, murditores, robbatores, & burglatores non recipient, &c. Et si Huteſiũ vel Clamorẽ de talibus audiverint, ſtatim audito clamore ſequantur cum familia, &c. and herewith agreeth Britton.

Britton fo. 15. & 19. Fleta li. 1. c. 24.

The ſtatute of W. 1. cap. 9. being in affirmance of the Common law, provideth, Que touts communement ſoient preſts a les ſomons des Viſcounts, et au crie de pais de ſuer & arreſter felons, quant miſter ſerra, auxibiens deins franchiſes come dehors.

See the 2. part of the Inſtitutes. W. 1. ca. 9.

And the ſtatute of 4 E. 1. declareth the law ſimiliter de omnibus homicidiis, Burglar', occiſis, ſeu * pericliatantibus levetur Huteſiũ, &c. & omnes ſequantur Huteſium, & veſtigium ſi fieri poteſt: & qui non fecerit, & ſuper hoc convictus fuerit, attachietur quòd ſit coram Juſticiariis de Gaola, &c. And by that Act it appeareth that ſo it is in caſe of Rape, and therewith agreeth [a] Bracton alſo.

4 E. 1. de officio coronatoris. See the ſtatute of Winch. 13 E. 1. * 7 E. 3. fo. 16. 22 Aſſ. 57. 38 E. 3. fo. 6. aſſaulted to be robbed. 9 E. 4. 26. See the Cuſtum' of Norm. ca. 24.

The life of hue and cry is freſh ſuit.

[b] Thamar the daughter of King David being violently raviſhed by her brother Amnon, the Text ſaith of her, Quæ aſpergens cinerem capiti ſuo, ſciſſa talari tunica, impoſitiſque manibus ſuper caput ſuum ibat ingrediens, & clamans.

[c] They which levy not Hue and Cry, or purſue not upon hue and cry, ſhall be puniſhed by fine and impriſonment. [d] Alſo if a man be preſent when a man is murdred, or robbed, and doth not endeavour to attach the offender, nor levy hue and cry, he ſhall be fined and impriſoned.

a Bracton li. 2. fo. 28 E. 3. ca. 11. b 2 Regum c. 13. Verſ. 19. c Bract. li. 3. fo. 118. b. Caſtin. m. c. 155. 3 E. 3. Cor. 333. d See 8 E. 2. Cor. 395.

Of Hue and Cry by force of Acts of Parliament in five caſes. [e] Firſt, if a watchman doth arreſt a night walker, and he diſobey and fly, the watchman may make hue and cry.

e Stat. de Winc. watch. 4 H. 7. fo. 2. 18.

2. [f] Si quis Foreſtarius, Parcarius, aut Warrennarius in baliva ſua malefactores aliquos invenerit vagantes ad damnum ibidem faciend', & qui ſe Foreſtariis aut Warennariis illis poſt Clamorẽ & Huteſium levatum ad pacem regis ad ſtandum recte reddere noluerint, immo ad malitiam ſuam exequend' & continuand' & pacem regis diffugiend' fugam fecerit, & vi & armis ſe defenderint, licet Foreſtarii, Parcarii & Warrennarii illi, aut alii quicunque ad pacem domini regis exiſtentes in comitativa Foreſtariorum, Parcariorum, aut Warrennariorum illorum venientes ad tales malefactores ſic inventos arreſtand' ſeu capiend', aliquem ſeu aliquos hujuſmodi malefactorum interfecerint, non propter hoc occaſionentur coram domino rege, & juſticiariis quibuſcunque aut aliis balivis domini regis, aut aliorum quorumcunque infra libertatem aut extra; nec propter hoc amittant vitam, aut membrum, aut aliam pœnam ſubeant, immo firmam pacem domini regis inde habeant. Sed bene caveant Foreſtarii, Parcarii, Warrennarii, & alii quicunque, ne occaſione contentionis, diſcordiæ, contumeliæ, aut alicujus malevolentiæ, ſeu odii præhabit' aliquibus per balivas ſuas tranſeund' malitioſe imponant, quod occaſione malefaciendi in balivis ſuis intrant, cum hoc non fecerint, nec ipſos vagantes ut malefaciant, nec malefacientes invenerint, nec cauſam malefaciendi quærentes, & ſic eos occidant. Quod ſi fecerint, & de hoc fuerint convicti, fiat de morte ſic interfectorum, prout aliorum ad pacem domini regis exiſtentium, & prout de jure & ſecundum conſuetudinem regni fueris faciend.

f Statutum de Anno 21 E. 1. Magna Cart. fo. 118. 2. Foreſters.

3. Welſhmen outlawed, or indicted of treaſon or felony, that fly into Herefordſhire, ſhall be apprehended, &c. or elſe purſued by hue and cry, and a forfeiture upon thoſe that doe not purſue.

23 H. 8. c. 5. Vid. 17 H. 8. c. 26. Welſhmen.

4. Hue and Cry ſhall be levied upon takers of carriage within the Wierge of the Staple of that which pertaineth to the Staple.

27 E. 3. ca. 4. ſtaple.

5. Where a man is robbed: Upon hue and cry, &c. what remedy he ſhall have againſt the hundred, &c. and how and in what manner the hue and cry ſhall be made in that caſe, ſee the ſtatutes, & lib. 7. fo. 6. & 7. the ſtatutes well expounded. And this robbery muſt be done in the day time, and not in the night, otherwiſe the party grieved ſhall not have his Action. And ſo note a diverſity between a hue and cry at the Common law, or for the King, and a hue and cry by ſtatute where the party grieved is to have his remedy by private action. Note alſo a diverſity in the proſecution at the Common law, or for the King, and by the ſtatutes which give the party remedy, for a proſecution to the next Conſtable is

Winch. 13 E. 1. 28 E. 3. c. 11. 27 El. c. 13. 38 El. ca. 25.

good by the Common law, but so it is not by the said statutes which give the party grieved his Action. See lib.7.fo.7.& 8, 22 El.Dier 370. So the prosecution at the Common law is a good excuse upon an Indictment at the Kings suit, but note that it is no bar to the parties Action.

Lib.7.fo.7,8.
22 El.Dier 370.

Where Hue and Cry either by the Common law, or by force of any statute is levied upon any person, the arrest of such person is lawfull, although the cause of the Hue and Cry be feigned, & if the cause be feigned, he that levy the same shall also be arrested, and shall be fined & imprisoned. But common fame and voice is not sufficient to arrest a man in case of felony, unlesse a felony be done in deed.

29 E.3.9.
38 E.3.6.
See 5 H.7.5.a.
21 H.7.28.a.

It is an article of the Leet, to enquire of Hues and Cries levied and not pursued.

Stat.de 18 E.2.

Mandatum est Guilielmo de Haverhull Thesaurario Regis, quòd Civitatem London capiat in manum Regis, eo quòd Cives ejusdem Civitatis non levaverunt Hutesium & Clamorem pro morte Magistri Guidonis de Arretio & aliorum interfectorum secundum legem & consuetudinem Regni. Teste Rege apud Windestok 22 die Augusti.

De civitate London capienda in manum Regis pro Hutesio non levato.
Rot.Claus.
30 H.3.m.5.

CAP. LIII.

Of Mayhem.

OF Mayhem you may read at large in the First part of the Institutes Sect.194. & 502. and in Justice Stanford. And where (as it is there cited) he saith, Castratio verò, quamvis latens sit, adjudicatur mahemium. hereof we find an example.

a First part Institutes §.194.502. Stanf.Pl.Cor. 38.b. Cust. de Norm. ca.79. Mehaimus. Bracton lib.3. 144,145. Fleta li.1.c.2.38.

b H. Hull indictatus fuit de mayhemio, eo quòd abscidit virilia Johannis monachi, &c. quem idem H. deprehendit, &c. cum A. uxore sua. Of the like accident you may read in Camden.

b Rot.Claus. anno 13.H.3. nu.9. See before ca.13. for cutting out of tongues, &c.

c Dominus Robertus Nevil (cum numerosam prolem ex uxore suscepisset) ignotus in adulterio deprehensus, & ab adulteræ marito in vindictam genitalibus mutulatus, brevi vi doloris expiravit.

Vide inter leges Alveredi. cap. 40. de vulneribus fo.43.

c Camden Brit. pag.593.

d By the ancient laws of England, he that maimed any man, whereby he lost any part of his body, the Delinquent should lose the like part, as he that took away another mans life, should lose his own.

d Bract.lib.3. fo.148. nu.4.

And it is truly said, that Duellum est Mahemium inceptum, and mahemium est Homicidium inchoatum. And therefore in the Appeal or Indictment it is said Felonice mayhemavit.

Mirror cap.4. §. De paines in divers manners. Brit.fo.48.b. Fleta li.1.c.38. Membrum pro membro. 18 E.3.102. Vide 28 E.3.fo.94. 8 H.4.28,21. Coron.458.

CAP.

CAP. LIV.

Of Premunire.

PRimerment pur ceo que monſtre eſt a noſtre ſeigniour le roy per grevouſes & clamouſes pleints des Grandees & Communes avant ditz, coment pluſors gents ſont, & ount eſtre treits hors de realme a reſponder des choſes dount la conuſans apperteint a la court noſtre Seigniour le roy; Et auxint que les judgements rendus in meſme le court ſont empeache en autre court, in prejudice & diſheriſon noſtre dit Seigniour le roy & de ſa corone, & de tout le people de ſon dit realme, & in defeaſance & anientiſment de la Common ley de meſme le realme uſe de touts temps. Sur quoy ewe bone deliberation ove les Grandees & auters de dit councell, Aſſentus eſt & accord per noſtre dit Seigniour le roy, & les Grandees & communes ſuiſditz. Que touts gents de la ligeance le roy, de quel condition que ilz ſont, que trahent nulluy hors de realme en plea dont le conuſance apperteint a la court le roy, ou des choſes dont judgement ſoit rendus en le court le roy; ou que ſuent en autri court a defaire ou impeacher les judgements rendue in le court le roy Eient jour, &c. In Engliſh thus.

27 E.3.cap.1. The print being examined agreeth with the Record. See the firſt part of the Inſtitutes, Sect.199.

The ſtatute of 16 R. 2. cap. 5. ſaith, In curia Romana, vel alibi.

FIrſt becauſe it is ſhewed to our Lord the King by the grievous and clamorous complaints of the Great Men and Commons aforeſaid, how that divers of the people be, and have beene drawne out of the Realme to anſwer of things, whereof the cogniſance pertaineth to the Kings Court: And alſo that the judgements given in the ſaid Court be impeached in another Court in prejudice and diſheriſon of our Lord the King, and of his Crowne, and of all the people of his ſaid Realme; and to the undoing and deſtruction of the Common law of the ſame Realme at all times uſed. Whereupon, upon good deliberation had with the Great Men and other of his ſaid Councell, it is aſſented and accorded by our Lord the King, and the Great Men and Commons aforeſaid, that all the people of the Kings ligeance, of what condition that they be, which ſhall draw any out of the Realme in plea, whereof the cogniſance pertaineth to the Kings Court, or of things whereof judgement is given in the Kings Court, or which doe ſue in any other Court to defeat or impeach the judgements given in the Kings Court, ſhall have day, &c.

The effect of the Statute of 16 R. 2. is, If any purſue or cauſe to be purſued in the Court of Rome, or elſewhere, any thing which toucheth the King, againſt him, his Crowne and Regality, or his Realme, their Notaries, Procurators, &c. Fautors, &c. ſhall be out of the Kings protection. 16 R. 2. cap. 5.

Fourth part of the Inſtitutes, cap. 8. Artic. 1. Die Decemb. Anno 21 H. 8. againſt Cardinall Woolſey. Vet. N. B. 143.

In this Act is declared the Soveraignty, Prerogative, and Freedome of the Crowne of England, and the firſt Article exhibited by the Lords of the Councell, (whereof Sir Thomas More Chancellor was one) and the principall Judges concerning this matter, is worth your reading.

This offence is called a Premunire of the words of the Writ, grounded upon this and other Statutes for puniſhment thereof. For the words of the Writ be, Rex vicecomiti, &c. Præmunire fac. A. B. &c. And rightly it is ſo called, for he that is præmonitus is præmunitus.

Before the making of this Statute of 27 E. 3. there were three great miſchiefs. Firſt, that the Kings ſubjects have been drawn out of the Realme, to the anſwer of things, whereof the conuſance pertained to the Kings Court. Secondly, of things whereof judgements have been given in the Kings Courts. And thirdly, that after judgements given in the Kings Courts of the common law, of matters determinable by the common law, ſuits were commenced in other Courts within the Realme, to defeat or impeach thoſe judgements. And theſe three miſchiefs had three unſufferable effects: Firſt, the prejudice and diſheriſon of the King and of his Crowne. Secondly, the diſheriſon of all his ſubjects And thirdly, the undoing and deſtruction of the common law of this Realme: all which appeare in the preamble of this Act.

They are called (other Courts,) either becauſe they proceed by the rules of other lawes, as by the Canon or Civill law, &c. or by other trials, then the common law doth warrant. For the triall warranted by the law of England for matters of fact, is by verdict of twelve men before the Judges of the common law of matters pertaining to the common law; and not upon examination of witneſſes in any Court of equity: So as alia curia, is either that which is governed per aliam legem, or which draweth the party ad aliud examen. For if the freehold and inheritances, goods, and chattels, debts, and duties, wherein the King or ſubject hath right or property by the common law, ſhould be judged per aliam legem, or be drawne ad aliud examen, the three miſchiefs aforeſaid expreſſed in the preamble and in this Act ſhould follow, viz. diſheriſon of the King and of his Crowne, the diſheriſon of all his people, and the undoing and deſtruction of the common law at all times uſed: by which words of this Act it appeareth, that all theſe miſchiefs were againſt the ancient common lawes at all times uſed. And that alſo appeareth by the ancient Writs of the common law, called Ad jura regia, whereof ſome touch hath been given before, and which are worthy the reading: and alſo by divers Acts of Parliament; as the Statute of Carliſle, Anno 35 E. 1. whereof we have treated before in the Second part of the Inſtitutes: and by the ſtatute of 25 E. 3. De proviſoribus. And it is obſerved, that in 29 E. 3. within two yeares after the ſaid Act of 27 E. 3. that they that were called in queſtion upon the ſtatute of Premunire, Invenerunt manucaptores ſufficientes, & ſacramentum præſtiterunt, quòd non attemptabunt, citra mare vel ultra, quod in præjudicium regis, legum, ſeu coronæ, ſeu judiciorum in curia Regis reddit', tendere valeat quoquo modo, &c. Whereby, and many other like Records it appeareth, that judgements ought not to be queſtioned citra mare, in any Court, unleſſe it be according to the courſe of the Lawes of the Realme.

Regiſt. 61, 62, &c.

Mic. 29 E. 3 coram Rege. Rot. 44. Cornub. V. 46 E. 3. 13, 14. Nota, citra mare.

4 H 4 ca. 23.

By the ſtatute of 4 H. 4. cap. 23. it is ordained and ſtabliſhed, that after judgement given in the Courts of our Lord the King, the parties and their heirs ſhall be thereof in peace, untill the judgement be undone by attaint, or by error, if there be error, as hath been uſed by the Lawes in the times of the Kings Progenitors.

a 10 H. 4 1, 2. 18 H 6. 6. b.

[a] Alſo that which hath been ſaid appeareth by our Books and ancient Records, as hereafter ſhall appeare.

b 5 E. 4. 6. b. 44 E. 3. 36.

[b] 5 E. 4. fol. 6. where the ſtatute of 16 R. 2. cap. 5. ſaith, In curia Romana vel alibi, Eccleſiaſticall Courts within the Realme are within this word [alibi.]

c 11 H. 7. Premunire Fitz. 15 H 7. 9 acc' in. Intr. Raſt. 468.

[c] Mich. 11 H. 7. it was adjudged by the whole Court, that a ſuit in the Eccleſiaſticall Court within the Realme for a temporall cauſe, was in caſe of Premunire.

A

d A preſident of a Premunire, for ſuing in the Eccleſiaſtical Court for a debt.

e It was reſolved, that he that ſued in the Eccleſiaſticall Court for the forgery of a laſt Will and Teſtament, incurred the danger of a Premunire, becauſe the party grieved might have his remedy by the common law. And in the ſame year of 17 H. 7. Juſtice Spilman alſo reporteth, that one Turbervile, as well for the King, as for himſelfe, did ſue a Premunire againſt a perſon for ſuing for tithes in the Eccleſiaſticall Court, alledging the ſame to be ſevered from the nine parts, and judgement given againſt the defendant.

Alſo it appeareth that the Admirals Court is within this word [alibi] if he hold plea of any thing, which is not done ſuper altum mare, but infra corpus comitatus.

f Richard Beuchampe Eſquire and Thomas Paunceſoot Eſquire, and others, are charged with the offence of Premunire, for that they ſued John Creſſey Eſq; before Henry Duke of Exeter Admirall of England, for taking away a Croſſe of gold and other goods, ſuppoſing the ſame to be taken ſuper altum mare, where in truth they were taken at Stratford in the County of Eſſex; where the ſtatute of 16 R. 2. is recited, that none ſhould ſue in curia Romana ſeu alibi, &c. and that the conuſance of this plea belonged to the common law, and not to the Court of the Admirall. And ſo it is of the Conſtable and Marſhall, if they hold plea of a matter determinable by the common law.

g Iſabel Winnington exhibited a bill of Premunire againſt William Powdich upon the ſtatute of 16 R. 2. cap. 5. for ſuing in the Admirall court before John Earle of Huntingdon, Admirall of England, for a cauſe which belonged to the common law, whereunto the defendant pleaded not guilty.

And the reaſon of all theſe caſes is, becauſe they draw matters triable by the common law ad aliud examen, and to be diſcuſſed per aliam legem.

But ſome have made a queſtion, Whether ſince the Eccleſiaſticall Juriſdiction was acknowledged to be in the Crowne, an Eccleſiaſticall Judge holding plea of a temporall matter belonging to the common law, doth incurre the danger of a Premunire. Though hereof there is no queſtion at all, yet leſt any man might be led into an errour in a caſe ſo dangerous, we will clear this point by Reaſon, Preſident, and Authority. The reaſon holdeth ſtill to draw the matter ad aliud examen, &c. And the like queſtion might be made for the Admirall court, which is, and ever was, the Kings Court, but governed per aliam legem: and ſo likewiſe of the Court of the Conſtable and Marſhall.

At a Convocation holden Anno 22 H. 8. by a publick inſtrument made by all the Biſhops and the whole Clergie of England, the King was acknowledged to be Supreame Head of the Church of England. h After this, viz. 24 H. 8. it appeareth that the Statute of Premunire remained in force againſt Eccleſiaſticall Judges, for holding of pleas meerly determinable by the common law.

In 25 H. 8. Richard Nick Biſhop of Norwich was attainted in a Premunire at the Kings ſuit, and his caſe was this. Within the Towne of Thetford there then was a cuſtome, that all Eccleſiaſticall cauſes riſing within the ſaid Town ſhould be determined before the Deane there, having a peculiar Eccleſiaſticall Juriſdiction, and that no inhabitant of the ſame Town ſhould be drawn before any other Eccleſiaſticall Judge, and that every perſon ſuing contrary to that cuſtome, the ſame being preſented before the Maior of Thetford, ſhould forfeit ſix ſhillings eight pence; and that an inhabitant of Thetford for an Eccleſiaſticall cauſe riſing within Thetford, ſued another before the Biſhop of Norwich within his Conſiſtory court at Norwich: and this was preſented before the Maior of Thetford according to the cuſtome, whereby he forfeited ſix ſhillings eight pence. The ſaid Biſhop cited the ſaid Maior for taking of the ſaid Preſentment Pro ſalute animæ to appear before him at his houſe at Horon in Suffolke, where the Maior appeared, and there the Biſhop ore tenus injoyned him, upon pain of Excommunication to adnull the ſaid preſentment before a day. And for this offence he was attainted in a Premunire upon his confeſſion before Fitz James Chief Juſtice, and the Court of Kings Bench, upon the ſtatute of

d Raſt. pl. 429. b. & 430.

e 17 H. 7. of the report of Juſtice Spilman.

f Mic. 38 H. 6. coram Rege.

g Mic. 9 H. 7. coram Rege. Raſt. pl. 23. but this cauſe is entred. Trin. 9 H. 7. Rot. 37. coram Rege.

h 24 H. 8. tit. premunire, Brook 16.

Hil. 25 H. 8. coram Rege, Rot. Rich. Nick Biſhop of Norwich his caſe.

of 16 R. 2. the Record whereof we have ſeen. By which judgement two points are cleared: Firſt, that the Statute of Premunire extends to Eccleſiaſticall courts within the Realme. Secondly, that after the King was in poſſeſſion of his Supremacy, the Biſhops incurred the danger of Premunire.

Trin. 36 H. 8. coram Rege. Rot. 9. the B. of Bangors caſe.

The Biſhop of Bangor was attainted in a Premunire for holding plea of an Advowſion, and of tithes ſevered from the nine parts.

D. & St. lib. 2. ca. 24. fo. 106. b. Lib. 2. ca. 23.

Saint Germin in his Book of Doctor and Student, who wrote after 26 H. 8. holdeth: That if a man maketh a promiſe for a temporall thing, and ſwear to perform it, and doth it not; if he be ſued for perjury in the Spirituall court, a Prohibition or a Premunire lyeth in that caſe. Alſo he ſaith: If a man be excommunicate in the Spirituall court for treſpaſſe, or ſuch other thing, as belongs to the Kings Crown and his Royall Dignity, &c. the party, if he will, may have a Premunire fac. againſt him.

Br. tit. Premunire. 21. Temps. E. 6.

Brook reporteth, that Barloe Biſhop of Bath and Wels, in the reigne of King E. 6. deprived the Deane of Wels, which Deanry was a Donative: and thereby incurred the danger of a Premunire.

1 Eliz. cap.

By the Statute of 1 Eliz. (which reſtoreth the ancient Jurisdiction Eccleſiaſticall to the Crown) the Act of 1 & 2 Ph. & Mar. cap. 8. is repealed. But there is a ſpeciall proviſo in that Act of 1 Eliz. that it ſhould not extend to repeale any Clauſe, Matter, or Sentence contained or ſpecified in the ſaid Act of 1 & 2 Ph. & Mar. which doth concerne matter of Premunire, but that ſo much of that, which concerneth any matter or cauſe of Premunire, ſhould ſtand in force and effect. And that clauſe of the Statute of 1 & 2 Ph. & Mar. is this. That whoſoever ſhall by any Proces obtained out of any Eccleſiaſticall Court, within the Realme or without, by pretence of any ſpirituall juriſdiction, or otherwiſe, contrary to the lawes of the Realme, inquiet or moleſt any perſon, &c. for any Mannors, &c. parcell of the poſſeſſions of any Religious Houſe, &c. ſhall incurre the danger of the Act of Premunire, in Anno 16 R. 2.

25 H. 8. ca. 20.

See the ſtatute of 25 H. 8. which alſo hath reference to the ſaid Act of Premunire, and is revived by 1 Eliz.

Trin. 29 Eliz. in Communi banco. Rot. 747. Tho. Stoughtons caſe.

Thomas Stoughton Parſon of N. in Suffolke, brought a Writ of Premunire againſt R. T. upon this ſtatute of 27 E. 3. for ſuing in the Court of Audience of the Archbiſhop of Canterbury, to impeach a judgement given in a Quare Impedit, before the Juſtices of Aſſize in the County of Suffolk, &c. the defendant pleaded not guilty, &c. And this (omitting many other things for this matter) ſhall ſuffice. And now let us peruſe the body of the Act.

¶ Trahe nulluy hors de realme.] Of this there is no queſtion, being againſt the ancient law of the Realme alwayes in uſe; as by this Act appeareth. And this was a remedie for the firſt miſchiefe.

¶ Ou des choſes dont judgements fuer' rendus, &c.] This branch prohibiteth all forain ſuits, viz. in the Court of Rome, &c. for any thing whereof judgement was given in the Kings Court. And this was a remedie for the ſecond miſchiefe.

¶ Ou que ſuont en autre court a defaire ou impeacher les judgements rendue in le Court le Roy.] This is a remedy for the third miſchief. For having by the ſecond branch provided againſt forain ſuits to undoe, or impeach judgements in the Kings Court, this branch doth (as hath been ſaid) extend to all Courts, which proceed by the rule of another law, or draw the party ad aliud examen, and therefore this branch doth extend to Eccleſiaſticall Courts, to the Court of the Conſtable, and Marſhall, to the Court of the Admiralty, and to the Court of Equity proceeding in courſe of equity: for it had been to no effect to have provided againſt forain ſuits, which were troubleſome, tedious, and chargeable, and to have ſuffered the party to have attempted and proſecuted any thing at home within this realm,

to

to the prejudice and diſherſon of the King, and his Crown, and all his ſubjects, and to the ſubverſion of the Common law. And firſt we will ſpeak of the Court of Equity. This Court cannot proceed in courſe of equity after judgement at the Common law, for three reaſons. Firſt, for that it waiveth the matter triable, and determinable by the Common law, ad aliud examen, viz. to a triall by witneſſes, which (as hath been ſaid) is contrary to the ancient laws of the Realm, and againſt the Purview of this ſtatute. Secondly, after judgment the parties ought to be at peace and quiet, for judicia ſunt tanquam juris dicta, and if the party againſt whom judgement is given, might after judgement given againſt him at the Common law, goe into court of Equity for matter in equity, there either ſhould be no end of ſuits, or every Plaintif would leave the Common law, and begin in the Court of Equity, whither in the end he muſt be brought, and that ſhould tend to the utter ſubverſion of the Common law, as it is ſaid in the Act. Thirdly, the Court of Equity in the proceeding in courſe of equity is no Court of record, and therefore it cannot hold plea of any thing, whereof judgement is given, which is a judiciall matter of record. And this is the ancient law at all times uſed, as this Act ſpeaketh. As taking ſome few examples for many, both before, and after this ſtatute. 37 H.6.14.

In the caſe of Edmond Earl of Cornwall in Anno 6 E.1. it appeareth, that after judgement given before Roger Loveday and Walter Winborn Juſtices of Oier and Terminer, againſt Walter Biſhop of Exeter and his Tenants, the ſaid Biſhop procured the Biſhop of Landaff in the Parith Churches of Cornwall and Devonſhire to pronounce ſentence of Excommunication by the ſentence of the Archbiſhop of Canterbury (which ſentence was had by the procurement of the ſaid Biſhop of Exeter) againſt all perſons of what eſtate, degree or dignity ſoever, that dealt in the proceedings, &c. againſt the ſaid Biſhop and his tenants before the ſaid Juſtices: and in this part of the record being in French, it is ſaid, La Corone, & la dignity noſtre ſeignior le Roy ne doit per autre eſtre Juſtice ne guyne, &c. Et les choſes que ſont paſſes en ſa court per judgement, ou en auter manner, ne devient eſtre en autri court recrecees, &c. Out of this Record we may obſerve three things. Firſt, what the antient law of this Realm was, before the making of this Act. Secondly, that [en autri court] which are the words of this Act, was taken to be another Court within the Realm. Thirdly, that the miſchief before this Act, was for ſuits in other Courts within this Realm, after judgements given in the Kings Courts. Read the whole Record, which beginneth thus. Cornub. Dominus rex mandat, &c. Anno 6 E.1. the Earl of Cornwals caſe. Lanceſton in Theſaur.

And in 13 E.3. there was a ſuit in the Court of Rome after judgement in the Kings Court, and in that Record it is ſaid, In regis contemptum, & Coronæ ſuæ præjudicium, ac judicii prædicti enervationē manifeſtam, &c. Acquòd judicia in curia Regis rite reddita fruſtra redderentur, niſi debitum ſortirentur effectum. Mich. 13 E.3. In Communi Banco Rot. 40. Inter Johannem de Dingle & Mich. de Englis. Bedf.

[a] Fleta who wrote before this ſtatute, ſaith, Judicia debent rata permanere, & firma conſiſtere, uſque ad condignam ſatisfactionem inviolabiliter obſerventur. *a* Fleta li.6.ca.36.

And as a Maxime of the Common law in the judiciall Regiſter, fo. 12. 35. 41, &c. it is often ſaid, Ea quæ in curia domini regis rite acta ſunt, debitæ executioni demandari debent. Trin. 19 E 3. Rot. 50. Coram Rege John Boltons caſe.

Now let us ſee what hath been done ſince the Act. [b] The ſtatute of 4 H. 4. cap. 23. hath been recited before, which is a judgement of Parliament. [c] A judgement was obtained by covin and practice againſt all equity, and conſcience in the Kings Bench: for the Plaintif retained by collution an Attorny for the Defendant, (without the knowledge of the Defendant, then being beyond ſea) the Attorny confeſſeth the Action, whereupon judgement was given, [d] the Defendant ſought his remedy in Parliament, and by Authority of Parliament power was given to the Lord Chancellor by advice of two of the Judges to hear, and order the caſe according to equity: which proveth that the Chancellour could not doe it of himſelf without higher Authority. Mich. 19 E.3. Rot. 16. & Rot. 29. Alan de Conesburgh. caſe. F.N.B. 169.f. 20 E.3.eſſoin. 24. 21 E.3.40.b. *b* 4 H.4 ca.23. *c* Paſc.5 E.4. Coram Rege inter Cobbe & Nore. *d* Rot. Parl. ſimile 3 H.5.nu.44. & 3 H.6.nu.12. *e* 21 E.4.37.

[e] No Injunction after verdict at the Common law is to be granted in Chancery, & if the Lord Chancellor ſhould grant an Injunction in that caſe the Judges ſaid, that

that if the Chancelor imprisoned the party for breach of the Injunction, they would grant an Habeas corpus and deliver him.

1. Decemb. 21 H.8. Art. 20.

Amongst the Articles preferred to the King by Sir Thomas Moore Lord Chancelor of England, and all the Privy Councel, and by Fitz-James Chief Justice, & Justice Fitz-Herbert against Cardinall Woolsey, one is in these words, [And the said Lord Cardinall hath examined divers and many matters in the Chancery, after judgement thereof given at the Common law, in subversion of your laws, and made some persons to restore again to the other party condemned that, that they had in execution by vertue of the judgement of the Common law] which I have seen in parchment under all their hands, and is yet to be seen.

Doct. & Stud. ca. 18. the book of diversity of Courts.

If judgements given in the Kings Courts should be examined in Chancery, before the Kings Councell, or any other place, the Plaintif or Demandant should seldome come to the effect of their suit, nor the law should never have end, &c. See the diversity of Courts ca. Chancery.

Mich. 8 & 9 El. in the Kings Bench.

Ralph Heydon Gent. was indicted of a Premunire upon the statute of 27 E. 3. for procuring of Sir Nicholas Bacon Lord Keeper of the Great Seal, to grant an Injunction in Chancery after judgement given in an Ejectione firme of lands in Hertfordshire. And the record saith, Quod predictus Radus machinatus est antiquas leges, & consuetudines regni subvertere.

Trin. 21 El. in Comuni Banco Rot. 319.

A writ of Premunire upon the said statute of 27 E. 3. by Richard Beans against Richard Lloyd, for suing before the President and Councell in Wales, after judgement given in the Court of Common Pleas, in an Action of debt for forty and two pound ten shillings, in subversionem legum antiquarum, &c.

Pasch. 27 El. in the Kings Bench.

Peter Dewse was indicted for procuring of Sir Thomas Bromly then Lord Chancelor, to grant an Injunction in the Chancery after a Judgement given in an Ejectione firme.

Trin. 30 El. in the Kings Bench. Diversity of Courts, ca. Chancery.

John Heal of the Inner Temple London Esquire, was indicted of a Premunire, for procuring a suit in Chancery after a judgment given at the Common law, contrary to the statute of 27 E. 3. And the councell of Heal took two exceptions, one, that the Court of Chancery was not within the statute of 27 E. 3. another, that one of the parties to the suit in Chancery was named in one place by one name of baptisme, and in another part of it by another. The Court resolved that the Court of Chancery was within the statute of 27 E. 3. but found the other exception concerning misnaming to be true. And therefore they quashed the Indictment, but made a memorandum indorsed upon the back of the indictment, that it was overthrown for mistaking a name, and not for the matter.

Mic. 39 & 40 El. See the Fourth part of the Inst. cap. Court of Chancery.

Thomas Throckmorton exhibited a bill in the Chancery against Sir Moyl Finch after judgement given against him in the Court of Exchequer upon apparant matter of equity. Upon which Bill the Defendant demurred in law, and for that Sir Thomas Egerton then Lord Keeper inclined to rule over the demurrer, saying that he would not meddle with the judgement, but punish the corrupt conscience of the Defendant, in relieving the Plaintif in equity: Upon a petition to Queen Eliz. (who ever favoured the due proceeding of her laws,) she referred the consideration of the Demurrer to all the Judges of England, who hearing Councell learned on both parts, and upon view of Presidents in the time of H. 8. and since of Injunctions granted after judgements, and finding very few of them to warrant that which had been affirmed, and none of them to be done by the advice of any of the Judges, they all after divers hearings, and conferences, and consideration had of the laws and statutes of the Realm, unanimously resolved, that the Lord Keeper could not after judgement given relieve the party in equity, although it appeared to them, that there was apparant matter in equity. And amongst others, the Judges gave this reason, that if the party against whom judgement was given, might after judgement given against him at the Common law, draw the matter into the Chancery, it would tend to the subversion of the Common law, for that no man would sue at the Common law,

law, but originally begin in Chancery, seeing at the last he might be brought thither, after he had recovered by the Common law, and thereupon they all certified, that the Demurrer was good, and that Sir Moyl Finch the Defendant ought not to answer.

An Information upon this statute of 27 E. 3. against Sir Anthony Mildmay, for that he and other Commissioners of Sewers did impeach a judgement in the Kings Bench: he purchased a pardon from the King, and pleaded it. Hil. 12 Ja. Regis Coram Rege.

See a Privy Seal bearing Teste 18 Julii, Anno Domini 1616. to the contrary, obtained by the importunity of the then Lord Chancellor being vehemently affraid: Sed judicandum est legibus, and no President can prevail against an Act of Parliament. And besides, the supposed Presidents (which we have seen) are not authenticall, being most of them in torn papers, and the rest of no credit.

¶ Eient jour contenant le space de 2 moys per garnishment a faire a eux, &c.] By this it appeareth that a Premunire lyeth as well for the party, as for the King, and they both may joyn in one writ. 44 E. 3. 7. 36. 39 E. 3. 7. 7 E. 4. 2. 27 H. 6. 5. 36 H. 6 30.

* If the Defendant come not at the day, &c. by the expresse letter of the law judgement shall be given against him according to this Act. This suit need not be against them by originall writ, but if the Defendant be In Custodia Mareschalli, the suit may be against him by bill, because the end of the giving of the two months was, that they should have notice, which is satisfied, and therewith agreeth the Presidents; and the Defendant cannot be sued in any other Court, when they are In Custodia Mareschalli. See the statute of 18 El. cap. 5. but that statute extends to common Informers, and not when the suit is commenced by the party grieved. *43 E. 3. 6. 42 E. 3. 7. 2 R. 3. 17. 27 H. 6. 5. 22 H. 8. Tit. Præm. Br. 1. Tr. 39 E. 3. Rot. 95. Coram Rege. 39 E. 3. 37. 30 E. 3. 11. 44 E. 3. 36. Forebys case.

a But if the Defendant appear and plead, and the issue be found against him, or if he demur in law, &c. judgement shall be given against him, that he shall be out of protection, &c. And so hath this statute been interpreted, and judgement given accordingly. Peruse well the words of this Act for this point, and see the book in 8 H. 4. 6. a 8 H. 4. 6. Lib. 11. fo. 34. b. in Alex. Poulters case.

By the statute of 38 E. 3. cap. 2. the Defendant ought to appear in person, and therefore he cannot appear by Attorny without a speciall writ out of the Chancery: and this Act doth bind as well those that are Lords of Parliament as others. 39 E. 3. 7. 9 E. 4. 2. 15 H. 7. 9. F. N. B. 26. m.

¶ Avant le Roy & son Councell.] Here Councell cannot be taken, as most commonly it is, for his Judges of his Courts of Justice, who are said to be of his Councell for proceedings in course of Justice, because the Courts of Justice are hereafter in this Act named: neither doth it intend the Kings Privy Councell, but the King and the Lords of Parliament in Parliament, which is a Court of Justice. 27 H. 6. 5. 2 R. 3. 10.

See the First part of the Institutes. Sect. 164. Veigne les Burgesses al Parlement. There is Commune Concilium, Magnum Concilium, Privatum seu continuum concilium, and Concilium Justiciariorum, le Councel des Justices. The King is armed with divers Councels.

¶ Ils, lour procurators, Attornies, Executors, Notaries, & Mainteynors.] Note by this Act the Procurers, Attornies, Executors, Notaries, and Maintainers shall have the same punishment, that the Principall shall have. Note in the statute of 2 R. 2. this word (fautors) crept in, a word (derived à favendo) of a large extent, as it was construed in the reign of H. 8.

The Plaintif may choose whether he will make them all principals, or the one principall, and the other accessories, but the damages shall be severally tared. Stanf. pl. Cor. 44. f. 44 E. 3. 7. 36 H. 6. 30.

He that procures one to sue to the Court Christian, shall forfeit as much as he that sueth, and is principall as well as the other, and are in equall degree of Premunire: but if they both be indicted, the one of the act, and the other of the pro- 42 E. 3. 7. 8 R. 2. Prem. 12. 8 H. 4. 6. pl. com. 97. b.

procurement, and he that is charged with the procurement is found guilty, and the other by an other enquest is found not guilty, judgement shall never be given against him, which was indicted of the procurement, because he cannot be an offender, but in respect of the offence of the other.

See Littleton Sect. 199. and the 1. part of the Institutes the same Sect. Lib. 7. fo. 14. in Calvins case. 25 E. 3. ca. 2. See 5 El. ca. 1.

¶ Hors de la protection le roy.] By these words the persons attainted in a writ of Premunire are disabled to have any action or remedy by the Kings law, or the Kings writs; for the law and the Kings writs are the things whereby a man is protected and aided, so as he that is out of the Kings protection, is out of the aid and protection of the law.

But by the statute of 25 E. 3. it is provided, that he that purchaseth provisions to Abbies, or Priories shall be out of the Kings protection, and that a man may doe with him, as with the enemies of the King and his Realm, and that he, that shall commit any thing against such provisors in body or goods, or other possessions, shall be excused against all people.

34 H. 8. forfeit. Br. 101. Pasch. 21 El. resolution of the Judges in Trudgyns case. Dier manuscript. Vide before. 25 E. 3. Verb. Et soit assavoir.

¶ Et lour terres, biens, & chateux forfait au Roy.] This is intended of the lands that he hath in fee-simple, or for life, which the Delinquent might lawfully forfeit, and not lands in tail: for tenant in tail shall forfeit only for term of his life, for that was all he could lawfully forfeit at the making of this statute, either in case of Treason or Felony. And so it was resolved by the Judges in the case of Trudgyn of Devonshire, who was attainted of a premunire upon the statute of 13 El. cap. 2.

Nota, this is a new kind of forfeiture given by this law, and is penall, and cannot by equity extend further then the records, and therefore this Act extendeth not to the forfeiture of Fairs, Markets, Rents charges, Rent seck, Warrens, Annuities, or any other hereditament that is not within this word (terre.)

¶ Lour corps imprison, & rents al volunt le Roy.] The greatnesse of these punishments doe shew the greatnesse of the offence.

16 R. 2. ca. 5. Examples of these are quoted before.

It is to be observed, that the said statute of 16 R. 2. is strictly penned against offenders. For first it extendeth to all persons of what quality, or ser soever, the words be [if any] 2. To all Courts of what Jurisdiction soever, and whether holden by right or by wrong, In curia Romana, seu alibi, which word (alibi) is a word of a large extent, as before it appeareth. 3. To all things whatsoever. [Where any thing,] which words be as generall as can be. 4. Not only against the King, his Crown and dignity, but against the kingdome also against the King, his Crown, and regalty or Realm. 5. This Act extendeth not only to procurers, abetters, maintainers, counsellors, &c. which are known words in law, but to favourers, fautores, which word was largely extended in the reign of H. 8. Whereby it is to be observed how dangerous it is to bring new or unusuall words into any Act of Parliament, especially into such as be so penned: for there it appeareth that Cliff being a Parson of a Church granted to the Cardinall an annuity, so long as he should be Legate, ut decentius & sublimius se gereret in authoritate sua Legantina, which the Cardinall had by Bull, and paid to him ten marks in name of season, and he was adjudged a fautor. But such evasions were found out of this and other statutes, as were made against usurpations and incrochments upon the good and ancient Common law, as divers and many statutes were made from time to time to meet with such evasions, which being many, (and others which concern the offence of premunire) we will but name, and leave the reader to peruse the same at large, wherein (as we conceive it) he shall find a great light, by that which hath been said, viz. 25 E. 3. ca. 22. 25 E. 3. Statut. de provisoribus. 38 E. 3. ca. 1, 2, 3, 4. 3 R. 2. cap. 3. 7 R. 2. ca. 12. 12 R. 2. ca. 15. 13 R. 2. Stat. 2. ca. 2. 16 R. 2. cap. 5. 2 H. 4. cap. 3. & 4. 6 H. 4. cap. 1. 7 H. 4. ca. 6. & 8. 9 H. 4. ca. 8. 3 H. 5. cap. 4. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20, 21. 26 H. 8. cap. 15. 28 H. 8. cap. 10. 35 H. 8. ca. 1. Note, Queen Mary repealed

Vide Justice Spilmans Report. Mich. 21 H. 8. Cliffs case.

repealed all offences made to be in the case of premunire since the first day of the first year of H.8. but some of them are revived by the statute of 1 El. ca. 1. But in all Queen Maries time, the statutes made concerning the offences of premunire before the reign of H.8. were neither repealed nor altered, but (as hath been said) allowed of in Queen Maries time. 1 & 2 Ph. & Mar. ca.8. 1 El.ca.1. 5 El.ca.1. 13 El.cap.1.2.8. 27 El.ca.2. 21 Iac.ca.3. 1 Mar.ca.1.

And where the statute of 25 E.3. De Provisoribus provideth, that certain offenders against that Act, shall before they be delivered, make full renunciation, &c. because we desire that our student may in all things understand what he reads: It is to be known, that as well before that statute, viz. in the reigns of E.1. and E.2. as after, the form of renunciation was to this effect. I renounce all the words comprised in the Popes Bull to me made of the Bishoprick of A. (or the like) the which be contrary, or prejudiciall to the King our Soveraign Lord, and to his Crown, and of that I put my self humbly in his Grace, praying to have restitution of the temporalties of my said Church, &c. Whereby it may appear what the law was in that case before 25 E.3. And albeit these laws be very severe, especially against the Buls, &c. of the Pope, and forain jurisdiction, and though Queen Mary restored his supremacy in such sort as hereafter appeareth, yet would she not repeal the said statutes of Provision and Premunire, but provided that they should stand in force. See the statute of 1 & 2 Ph. & Mar. whereby it is enacted, That whosoever should by any proces obtained out of any Ecclesiasticall Court within this Realm, or without, or by pretence of any spirituall jurisdiction, * or otherwise, contrary to the laws of this Realm, inquiet, or molest any person, &c. should incur the danger of the Act of Premunire made in the sixteenth year of the reign of King R. 2. &c. And by another branch in the same Act it is enacted, That all Buls, Dispensations, and priviledges not containing matter contrary, or prejudiciall to the authority, dignity or preheminence royall of the Realm, or to the laws of this Realm now being in force, and not in this present Parliament repealed, may be put in execution. And lastly, by the same Act, it is declared and enacted, That neither any thing contained in the body of the said statute, or in the Preamble thereof, shall be construed, or expounded to diminish, or take away any of the liberties, priviledges, prerogatives, preheminences, authorities or jurisdictions which were in the Imperiall Crown of this Realm, or belonged to the same before the twentieth year of H.8. and the Popes holines to have such authority, preheminence, and jurisdiction, as his Holinesse used, or might lawfully have used by authority of his Supremacy the said twentieth year of H.8. within this Realm of England, without diminution or enlargement of the same, and none other. Whereby it appeareth how carefull the State was in Queen Maries time to preserve the Prerogative of the Crown, and the ancient laws of the Realm, and did at that time so cautiously restore the Supremacy of the Pope, secundum quid, but not simpliciter, and bounded his Supremacy within strait and legall limitations, as by the said Act appeareth. Dier Manuscrip. Hil.1 El.le case de Christoforson Evesque de Chichester. 1 & 2 Ph.& Mar. ca.8. * Nota.

See the statutes which inflict the punishment of premunire, viz. 2 R.2. c.12. 3 R.2.ca.3. 7 R.2.ca.12. 24 H.8.ca.12. 25 H.8. ca.19, 20. 1 El. cap. 1. 26 H. 8. cap.15. 28 H.8.ca.16. 1 & 2 Ph. & Mar.cap.1. 8 El.cap.1. 5 El.ca.1. 13 El.ca.2.8. 39 El.ca.1 8. 27 El.ca.2. See the Fourth part of the Institutes, cap. Chancery, the Articles at large against Cardinall Woolsey. Artic.7.

We have been the longer concerning cases of Premunire. First, for that they be matters of great weight, and necessary to be known, and we wish that the offence may never be committed. And secondly, for that Master Stanford hath in effect but named a Premunire. Stan.pl.cor.44.E.

CAP. LV.

Of Propheſies.

33 H. 8. cap. 14.
1 E. 6. cap. 12. Nota.
1 Mar. ſtat. unicum, Seſſione prima.
5 Eliz. cap. 15. Mitius imperanti melius paretur.
* Nota. The like Act was made, 3 & 4 E. 6. ca. 15. expired.

PRopheſies upon declaration of Armes, Fields, Names, Cogniſances, or Badges, were made felony without the benefit of Clergy: but this Act is twice repealed by generall words of all Felonies made by any ſtatute ſince the Firſt year of H. 8.

In Anno 5. Eliz. a more moderate Statute was made againſt Propheſies by Writing, Singing, or other open Speech, or Deed, by the occaſion of any Armes, Fields, Beaſts, Badges, or other like things accuſtomed in Armes, Cogniſances, or Signets; or by reaſon of any time, year, or day, name, bloodſhed or warre, * to the intent thereby to make any rebellion, inſurrection, diſſention, loſſe of life, or other diſturbance within this Realm, or other the Queens Dominions. For the firſt offence impriſonment of his body by the ſpace of a year without baile, and forfeit to the Queene and Informer, ten pound. And for the ſecond offence, impriſonment during life without baile, and forfeit to the Queen all his goods and chattels, reall and perſonall: but he muſt be therefore impeached or accuſed within ſix Moneths next enſuing the offence by him done. A juſt and neceſſary limitation, and the rather, for that the offence may be committed by bare words. This offence is to be heard and determined before Juſtices of Aſſiſe, Juſtices of Oier and Terminer, and Juſtices of Peace.

See hereafter the Chapter of Newes, and the Second part of the Inſtitutes, W. 1. cap. 33. He that hath read our Hiſtories ſhall finde, what lamentable and fatall events have falne out upon vain Propheſies carried out of the inventions of wicked men, pretended to be ancient, but newly framed to deceive true men: and withall, how credulous and inclinable our countreymen in former times to them have been. we will ſet down the truth concerning the ſame.

Certaine it is, that to foretell of things to come, is a prerogative appropriated to the Holy Ghoſt; and that the Devill cannot prædicere, foretell of things to come, which notwithſtanding, S. Auſtin did ſometime hold that he could. But afterwards juſtly retracted it in theſe words, Rem dixi occultiſſimam audaciore aſſertione, quam debui, &c. certiſſimum eſt Dæmones non præſcire.

Auguſt. in lib. Retract.

Now for the predictions and foretellings of the Sibyls being Gentiles, ſo long before the Incarnation of our Saviour Chriſt: and more directly and particularly, of thoſe high myſteries of the Incarnation and Paſſion of Chriſt, the coming of Antichriſt, the ſubverſion of Rome, and the end of the world, they are by the true Prophets of Almighty God, who ſpake by the Holy Ghoſt, well diſcovered; that while the Church was in her Cradle, theſe predictions were invented and fathered upon the Gentiles; to the intent to make the doctrine of the ſaid high myſteries of the Goſpell the more credible amongſt the Gentiles. And if any ſuch predictions had been by the ſaid Sibyls, out of queſtion thoſe great Lights of Nature amongſt the Gentiles, Plato, Ariſtotle, Theophraſtus, or ſome other of thoſe great Philoſophers, that with great alacrity dived into the ſecrets of all kindes of learning, would have found them out, and made ſome mention of them. But beſides the ſaid [a] diſcovery, ſuch predictions by the Gentiles and Heathen perſons are [b] againſt the word of God.

[a] Caſaubone Exercit. 1. ad appiratum Annalium, cap. 10.
[b] Epheſ. c. 3. v. 9. Col. cap. 1. v. 26. Rom. ca. 16. v. 25.

Alſo predictions either of the time of the end of the world, or that it is at hand, is not lawfull. For the firſt, [c] ſee the firſt of the Acts, It is not for us to know

[c] Acts c. 1. v. 7. Mat. 24. 36. Mark 13. 32.

the

the times and ſeaſons which the Father hath put in his own power, &c. For the ſecond, ſee the Second Epiſtle to the Theſſalonians. I beſeeech you brethren, &c. that you be not ſhaken in minde, or troubled, &c. as though the day of Chriſt were at hand, let no man deceive you by any means. 2 Theſſ. c. 2. v. 1, 2

We have the rather ſaid hereof thus much, for that we have heard divers men boldly and confidently upon their Numerall calculation to have erred herein.

CAP. LVI.

Of Approver.

A Prover, or Approver, in Latin Probator, is a perſon indicted of Treaſon or Felony in priſon for the ſame, and not diſabled to accuſe: he may [a] upon his arraignment, before any plea pleaded, and before competent Judges [b] confeſſe the Indictment, and take a corporall oath to reveale all treaſons and felonies, that he knows, and pray a Coroner, before whom he is to enter his appeale or accuſation againſt all thoſe that are participes criminis, or of his ſociety in committing of treaſon or felony contained in the Indictment, thoſe partners being within the Realme: and if upon his appeale [c] all thoſe partners be convicted, the King ex merito juſtitiæ, is to pardon him. But it is in the diſcretion of the Court, either to ſuffer him to be an Approver, or after his approvement to reſpite judgement and execution, untill he hath convicted all his partners.

Parl 28. E. 1. ca. Nota, for confronting.
[a] 9 H. 5. cor. 440. 21 E. 3. 18. 19 H. 6. 47. 2 H. 7. 3. 12 E. 4. 10. 3 H. 6. 50, 51.
[b] 1 H. 5. cor. 443. 3 H. 6. 50, 51. in Bank le roy. Paſch. 1 H. 4. coram Rege pl. 6.
[c] 21 H. 6. 29. b. & 34. b.

A Prover] [d] He is by Bracton called Probator, by Britton, Provor, by the Mirror Provor and Approver: and his name putteth him in minde of his duty, viz. to prove and approve his accuſation or appeale in every point, for [e] any fayler of truth diſableth him in omnibus. And as he muſt affirme the truth, and the whole truth, before the Coroner in his appeale: ſo in the rehearſall of the appeals before the Juſtices, it muſt agree with the appeale, 26 Aſſ. p. 19. & Bracton ubi ſupra. [f] In one Record I finde him called Appellator.

[d] Brad. lib. 3. fo. 122. b. & 152, &c. Britton. fo. 7. 11. 17. 48. Mirr. cap. 1. § 13. cap. 3. exec. al. provers, cap. 5.
[e] 25 E. 3. 41. 21 H. 6. 34. 22 E. 3. cor. 460. 26 Aſſ. p. 19.
[f] Paſch. 2 H. 4. coram Rege. 6.

¶ Perſon.] This extendeth not to a Peer or Lord of Parliament, for it is againſt Magna Carta, cap. 29. for him to pray a Coroner.

[g] A man attainted of treaſon or felony cannot become an Approver, becauſe (as the book ſaith) he is Hors de la ley. Alſo though he be indicted, yet if he be out of priſon, he cannot approve.

[g] 11 Aſſ. pl. 17. 19 E. 2. cor. 387. 19 E. 3. ibid. 443. 17 E. 3. 13. 21 E. 3. 18.

[h] The Mirror ſaith, that Women, Infants, Idiots, Lepers, or Profeſſors in order of Religion, or Clerks, or perſons attainted of felony, or Non compos mentis, cannot be Approvers: and Stanford addeth men above the age of 70, or maymed; becauſe ſome of them cannot take an oath, and none of them can wage battell.

[h] Mirr. ca. 1. § 13. Stanf. pl. cor. 140. d.

¶ Indicted.] [i] For in any appeale either by Writ or Bill the defendant ſhall not become an Approver: and before indictment, no perſon can approve, becauſe if his approvement be falſe, no judgement (whatſoever he confeſſed) can be given againſt him, unleſſe he be indicted, [k] and no judgement can be given againſt him if his appeale be falſe, but of the offence contained in the Indictment, and ſo are the books to be underſtood.

[i] 40 Aſſ. 39. 15 E. 3. cor. 113. 11 H. 7. 5.
[k] 25 E. 3. 39.

[l] If one be indicted and approve, if after an appeale be ſued againſt him, the approvement ceaſeth.

[l] 8 H. 5. cor. 442.

¶ Of treaſon or felony.] And that is only of that treaſon or felony that is contained in the Indictment, as hath bin ſaid. [m] See Trin. 3. H. 4. Rot. 19. Coram Rege Hertford, Probator in duello devicit appellat', de alta proditione, pro

[m] 19 H. 6. 4. 12 E. 4. 10. 6 H. 6. cor. 131. 19 E. 2. cor. 387.

pro quo devictus suspenditur, decapitatur, & quarteria sua dividuntur. Et simile ibid. Anglia.

a 6 H 6. ubi sup. 21 E.3.fo.18. V.3 H.6.51,52.

¶ In prison.] a Albeit he be indicted, yet if he be at large, and not in prison, he cannot approve, as before is said.

b Bract. ubi sup. 9 H.4.1. 2 H.4.19. 44 E.3.44. Lib.10.fo.76.b.

¶ Competent Judge.] b As Justices of the Kings Bench, Justices of Oier and Terminer, and of Gaole delivery, but not Justices of Peace, because they have no authority by their Commission to assigne a Coroner. And by the same reason the Lord High Steward of England cannot assigne a Coroner in case of treason or felony.

12 E.4.10.

¶ Corporall oath.] Though the Oath be generall of all treasons and felonies, yet in course of law no approvement can be, but of the offence contained in the Indictment, as hath been said. And this Oath and the accusation of himself make his appeal or accusation of another of the same crime, to amount in law to an Indictment.

21 H.6.34.35.

40 Ass.39. 10 E.4.14.

¶ Particeps criminis.] For it cannot be of another treason or felony then is contained in the Indictment.

1 E.3.17. 1 Ass.p.2.

¶ Within the Realme.] For if it be out of the Realme, it wanteth triall, and therefore the accusation or appeale not to be allowed.

26 Ass.19. 8 H.5.cor.459. 21 H.6.34. 12 E.4.10.

¶ Ex merito justitiæ.] And the reason is, for that he riddeth the countrey of wicked and hurtfull misdoers: whereby the Kings peace is kept, and the Subject enjoyeth his own in quiet. And therefore the King doth in the meane time give him wages.

Mich. 39 E.3. coram Rege Rot.97 Suff.

A man became an Approver and appealed five, and every of them joyned battell with him. Et duellum percussum fuit cum omnibus, & Probator devicit omnes quinque in duello, quorū quatuor suspendebantur, & quintus clamabat esse clericum, & allocatur; & Probator perdonatur: so as the approver did and ought to fight in that case with all the appellees. But if there be two or more approvers against one man of one felony, and he joyne battell with them all, and vanquish the first, he is acquitted against the other. Concerning the Proces upon an approvement and other incidents, you may reade in Mr. Justice Stanford, which need not here to be rehearsed.

7 E.3.7. 31 H.4.91.b. Of battell see more here, Cap. Single combat, and the second part of the Institutes, Westm. 1. cap.40.

* If the appellee joyne battell, or plead not guilty, and after the King pardoneth the approver, the appellee shall be discharged, and shall not be arraigned at the suit of the King.

* 47 E.3.5.

Stanf.pl.cor. 142.

¶ Convicted.] The appellee may choose either to wage battell with the approver, or to put himself upon the countrey; and if the appellee be found guilty by verdict, it serveth as well for the approver, as if he had been overcome by battell. And therefore the Book in 19 H. 6. 35. is misprinted, or misreported: and the note of Fitzh. in abridging the case, tit. Coron. pl.6. in the end, is against law. Vid. Rot. Parl. 17 E. 3. nu. 36.

19 H.6.35.2. Rot.Par. 17 E.3. nu.36.

CAP.

CAP. LVII.

Of Appeals.

OF Appeals we have ſpoken in the Firſt and Second parts of the Inſtitutes, and you may reade thereof in my Repoꝛts, Lib.4. fo.40,41.42,&c. Lib.5. fo.105.111. Lib.6. fo.44.80. Lib.7. fo.13.30. Lib.9. fo.13.119. Whereunto we will adde a [b] caſe which was adjudged in an appeal, where the caſe, as touching the point of the appeal, was thus. Thomas Burghe, brother and heire of Henry Burghe brought an appeale of murder againſt Thomas Holcroft, of the death of the ſaid Henry: The defendant pleaded, that before the Coꝛoner he was indicted of Manſlaughter, and before Commiſſioners of Oier and Terminer, he was upon that Indictment arraigned, and confeſſed the Indictment, and prayed his Clergie, and thereupon was entred Curia adviſare vult, and concluded, and demanded judgement, if that appeal the plaintife againſt him ought to maintain: whereupon the plaintife demurred in law. And in this caſe three points were adjudged by Sir Chriſtopher Wray, Sir Thomas Gawdie and the whole Court.

First, that the matter of the Barre had been a good Barre of the appeale by the Common law, as well as if the Clergie had been allowed: foꝛ that the defendant upon his confeſſion of the Indictment had prayed his Clergy, which the Court ought to have granted, and the deferring of the Court to be adviſed, ought not to prejudice the party defendant, albeit the appeale was commenced before the allowance of it.

First part of the Inſtitutes. § 189,500,501. Second part of the Inſtitutes, in Mag. Carr.ca.34 W.1.ca.14.fo.460 Cuſt. de Norm. cap.68.

[b] Paſch.20.Eliz. in the K. Bench. Tho. Holcrofts caſe, and after, viz. Mich.33 & 34 Eliz. between Kath. Wrote, late the wife of Rob. Wrote, Pl. in an Appeale againſt Tho. Wiggs def. coram Rege, for the death of her husband, reſolved againe accordingly.

The Second point adjudged was, that this caſe was out of the Statute of 3 H. 7. foꝛ that the woꝛds of that Act are,

If it fortune that the ſame Felons and Murderers, and Acceſſories ſo arraigned, or any of them to be acquited, or the principall of the ſaid felony, or any of them to be attainted, the wife or next heire of him ſo ſlaine, &c. may have their appeal of the ſame death and murder againſt the perſons ſo acquited, or againſt the ſaid principals ſo attainted, if they be alive, and that the benefit of his Clergie thereof before be not had.

3 H.7.cap.1.

And in this caſe the defendant Holcroft, was neither acquited noꝛ attainted, but convicted by confeſſion, and the benefit of Clergy prayed, as is afoꝛeſaid. So as the Statute being penall concerning the life of man, and made in reſtraint of the Common law, was not to be taken by equity, but is caſus omiſſus, and left to the Common law.

As to the third it was objected, that every plea ought to have an apt concluſion, and that the concluſion in this caſe ought to have beene, Et petit judicium ſi prædict. Thomas Holcroft iterum de eadem morte, de qua ſemel convictus fuit, reſpondere compelli debeat. But it was adjudged that either of both concluſions was ſufficient in law: and thereforе that exception was diſallowed by the rule of the Court.

Nota, the ancient law was, that when a man had judgement to be hanged in an appeal of death, that the wife, and all the blood of the party ſlaine ſhould draw the defendant to execution. And Gaſcoigne ſaid, Iſſint fuit in diebus noſtris.

11 H. 4. 11. Pl.com.306.b.

Richardus de Crek appellat quinque pro felonia, & offert diſtratiocinare per corpus ſuum contra quemlibet eorum ſeparatim. Ipſi petunt ſe allocari, quod ubi appellans dicit in appello ſuo, quod ipſi fregerunt oſtium Bracini, & non ſpecificat ex parte domus illius prædictum oſtium ſcitum fuit, & petunt judicium. Et Joh. Wanton unus defendent' defendit feloniam, & totum, & paratus eſt defendere per corpus

Trin.10.E.1. in Banco, Rot.30. Norff.

corpus ſuum ſicut curia conſideraverit. Ricus dicit quòd non poteſt pugnare contra prædictum Johannem, eo quod ipſe mahematus eſt in humero ſuo dextro. Et prædictus Iohannes petit judicium deſicut prædictus Ricus appellando ipſum optulit diſrationare prædictum Robertum verſus ipſum tanquam felonem prout eur' conſider' per corpus ſuum, & nullam fecit mentionem de aliquo Mahemio, unde petit judicium de appello iſto. Et ideo Conſiderat' eſt tam ad calumpniam prædicti Henr. & aliorum, quàm prædicti Iohannis, quòd appellum ejus nullum, Set pro rege inquiratur rei veritas &c.

Nota how the concluſion of the appeal of felony ought to be, when the Plaintif is mayhemed and cannot make try-all by battail.

* See before c.1. high treaſon fo.6. 1 H.4.ca.14. Glanv.li.14.c.1. Bracton lib.3.fo.118,119. Britton cap. 8 & 29. Fleta lib.1.ca.21. The Mirror cap.2.§.11. Pat.25 E.3. part.1.m.16. Mich. 4 H.4. Coram Rege Rot.22.&c. 8 H.6.ca.10.F.N.B.115. Lib. Intrat. Raſt. fol.122.

* There lay an appeal of high treaſon by the Common law either in Parliament before the ſtatute of 1 H.4.ca.14. or in ſuch of the Kings Courts as have jurisdiction thereof triable by battail or verdict: and this appeareth by all our ancient Authors, and divers records, and ſee in Bracton fo.119.a. What pleas the Defendant in the appeal of treaſon may have, to diſable the Plaintif to maintain his appeal, ſee Fleta ubi ſupra, & Britton ubi ſupra.

CAP. LVIII.

Of Treaſure trove.

Theſaurus inventus.

Cuſtum.de Nor. ca.18.

TReaſure trove is when any gold or ſilver, in coin, plate, or bullyon hath been of ancient time hidden, whereſoever it be found, whereof no perſon can prove any property, it doth belong to the King, or to ſome Lord or other by the Kings grant, or preſcription.

The reaſon wherefore it belongeth to the King, is a rule of the Common law; That ſuch goods whereof no perſon can claim property belong to the King, as wrecks, ſtrays, &c. Quod non capit Chriſtus, capit Fiſcus. It is anciently called * Fynderinga, of finding the treaſure. And now let us peruſe this deſcription.

* Inter leges H.1.ca.11.

¶ Gold or ſilver.] For if it be of any other metall, it is no treaſure: and if it be no treaſure, it belongs not to the King, for it muſt be Treaſure trove.

Pl.Com. In caſe de Mines per totum. Vid.Bract.li.2. fo.222. Auri fodina. & argenti fodina: Fleta lib.4.ca.19. Rot.Parl. 3 R.2. nu.42. 27 Aſſ.p.19.

It is to be obſerved, that veyns of gold and ſilver in the grounds of ſubjects belong to the King by his Prerogative, for they are royall mines, but not of any other metall whatſoever in ſubjects grounds.

¶ Whereſoever.] [a] Whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a caſtle, [b] houſe, building, ruines, or elſewhere, ſo as the owner cannot be known.

¶ Whereof no perſon can prove any property.] For it is a certain rule, [c] Quòd theſaurus non competit regi, niſi quando nemo ſcit qui abſcondit theſaurum.

Bract.l.1.fo.10. li.3.120. Britton fo.3.b. 7.b.26.b.71.b. Mir. ca.1.§.3.& §.13.ca.3.§.iſto. Glanv. l.1. ca. 1. li.14.ca.2.

¶ Of ancient time hidden.] [d] Eſt autem theſaurus vetus depoſitio pecuniæ, &c. cujus non extat modo memoria, adeo ut jam dominum non habeat.

¶ Belong to the King.] [e] Where of ancient time it belonged to the finder,

b In bundell Inquiſit. 32 E.3. in Abbathia Sanctæ Mariæ Eborum. Bract. ubi ſupra. Non refert in quo loco hujuſmodi Theſaurus inveniatur. *c* 22 H.6 Cor.446. *d* Bract. Ubi ſupra, and the other ancient Authors agree thereunto. *e* Glanv.li.1.c.1. li.14 ca.2. 8 E.2.Cor.436. 22 E.3.ibid.241.

finder, as by the said ancient Authors it appeareth. And yet I find that before the Conquest, Thesauri de terra domini regis sunt, nisi in Ecclesia, vel Cœmeterio inveniantur; & licet ibi inveniatur aurū, regis est, & medietas argenti est medietas Ecclesiæ, ubi inventum fuerit, quæcunque ipsa fuerit, vel dives, vel pauper.

¶ By the Kings grant or prescription.] 21 H.6.tit. Prescription. 4. 22 E.3.Cor.241. 1 H.7.33. 9 H.7.20. 46 E.3.16. Stanf.pl.Cor.39.b. Lib.5. fo.109.b.

¶ The punishment of him that concealeth,&c. it.] It appeareth by Glanvill, and Bracton also, that occultatio thesauri inventi fraudulosa, was such an offence, as was punished by death. But it hath been resolved, that the punishment for concealment of Treasure trove, is by fine and imprisonment, and not * of life and member. Glanvill ubi sup. Bracton and the other Authors ubi supra. * 22 Ass.p.99.

¶ To whom the charge thereof belongeth.] It belongeth to the Coroner, as appeareth by the statute de officio Coronatoris, Anno 4 E.1. The ancient Authors ubi supra, agree hereunto.

CAP. LIX.

Of VVreck.

SEE the Second part of the Institutes W.1. cap.2. and the exposition upon the same.

CAP. LX.

Of false tokens, or letters in other mens names.

IF any person falsly and deceitfully obtain into his hands any moneys, goods, chattels, Iewels, or other things of any person or persons, by colour or means of any false or privy tokens, or counterfeit letters made in any other mans name,&c. he shall suffer such correction by punishment of his body, setting upon the pillory, or other corporall pain (except pains of death) as shall be to him adjudged by the person and persons before whom he shall be convicted, with a saving to the party grieved by such deceit, such remedy by way of Action, or otherwise, as he might have had by the Common law. 33 H.8.ca.1.

Here it is to be observed, that upon this statute, for this offence the offender cannot be fined, but corporall pain only inflicted.

CAP. LXI.

Of Theftbote.

Stat.Wall.Anno 12 E.1.Vet.Mag. Cart.pt 2.fo.6.

THeftbote (deſcribed by Act of Parliament) eſt emenda furti capta ſine conſideratione Curiæ domini regis: and ſo much the word ſignifieth, bote being taken for amends; theftbote, that is, amends for theft.

See Rot.clauſ. An.1 E.1.m.7. 42 Aſſ.p.5. Mir.ca.2.§.12. 3 E.3.Cor.353. Stanf.Pl.Coron. 40.b. 42 Aſſ.ubi ſupra.

This offence is more then miſpriſion of felony, for that is not a concealment of his bare knowledge only: but Theftbote is when the owner not onely knowes of the felony, but taketh of the thief his goods again, [a] or amends for the ſame to favour or maintain him, that is, not to proſecute him, to the intent he may eſcape: but in that caſe, if he receive the thief himſelf, & aid and maintain him in his felony, then is he acceſſory to the felony. And ſo note a diverſity, quando proprietarius recipit latrocinium, & quando latronem. But if a man take his goods again that were ſtollen, it is no offence, unleſſe he favour the thief, as is aforeſaid.

3 E.3 Cor.353.

The puniſhment of Theftbote is ranſome and impriſonment: and ſeeing the puniſhment of Theftbote, which is greater then concealment of felony, is but ranſome and impriſonment, it ſtandeth with reaſon, that the puniſhment of [*] miſpriſion of felony ſhould be but fine and impriſonment. Theftbote is ſometimes taken pro ipſo latrocinio, for the thing it ſelf ſtollen from you.

[*] See before in the chapter of Miſpriſion of treaſon.ca.3. Mir.ca.1.§.17. Britton fo.33.

[a] That is, ſtoln cloth.

You ſhall read in ancient Authors of Redoubbors, Addoubors, derived of the French word addoubeur, they are in Law patchers, botchers, or menders of apparell, that take [a] theftbote of cloth (and change it into another faſhion) and are dwelling out of Burghs and Cities; becauſe in thoſe days burghs and cities were ſo well governed, as ſuch offenders were ſoon diſcoverd: for they were not then commended, for that they were populous, but for that the Governers were provident in preventing of offences.

CAP. LXII.

Of Indictments.

See the 1.pt of the Inſtitutes. ſect.194,195.

COncerning Indictments we have ſpoken ſomewhat in the Firſt part of the Inſtitutes. Sect.194.208. And you may read in my Reports many reſolutions concerning Indictments, viz. Lib.4. fo.40,41,42. &c. lib.5. fo.120, 121,122,123. li.7.fo.5,6,10. li.8.fo.57.36,37. li.9. fo.62,63. 116.118.

Holcrofts caſe. Artic.ſuper Cart. ca.10. The ſame was again reſolved in Wrots caſe, ubi ſupra.

We will add one point adjudged in the caſe between Burgh and Holcroft before mentioned in the Chapter of Appeals, which was, that where it is provided by the ſtatute de Artic. ſuper Cartas cap. 3. En caſe de mort del home (deins le verge) un office del Coroner appent as views, & enquefts de ceo faire, ſoit maunde al Coroner del pais que emſemblement ove le Coroner del hoſtel le Roy face loffice que appent, &c. And in that caſe one man was Coroner both of the Kings houſe, and of the County, & the Indictment of manſlaughter was taken before him as Coroner both of the Kings houſe, and of the County. And it was adjudged that the Indictment was good, becauſe the miſchief expreſſed in the ſtatute was remedied, as well when both offices was in one perſon, as when they were in divers: and therefore in this caſe the rule did hold, Quando duo jura concurrunt in una perſona, æquum eſt, ac ſi eſſet in diverſis.

Richard

Richard Weſton Yeoman, late ſervant of Sir Gervaſe Elwys, Lieutenant of the Tower, and under the Lieutenant, Keeper of Sir Thomas Overbury then priſoner in the Tower, was indicted: For that he the ſaid Richard the 9 day of May An. 11 Ia. Regis, in the Tower of London, gave to the ſaid Sir Tho. Overbury poyſon called Roſeacre in broth, which he the ſaid Sir Thomas received. Et ut idē Rich. Weſton præfatum Tho. Overbury magis celeriter interficeret & murdraret, 1 Iunii Anno 11 Ia. Regis ſupradict. gave to him another poyſon called White Arſenick, &c. & that 10 Iulii An. 11. ſuprad. gave to him a poyſon called Mercury Sublimat' in Tarts, ut prædict' Tho. Overbury magis celeriter interficeret & murdraret: and that a perſon unknown in the preſence of the ſaid Richard Weſton, and by his commandment and procurement, the 14 of Septemb. anno 11. ſupradict. gave to the ſaid Sir Thomas a glyſter mixt with poyſon called Mercury ſublimat, ut prædictum Thomam magis celeriter interficeret & murdraret. Et prædictus Thomas Overbury de ſeperalibus venenis prædictis et operationibus inde, à prædictis ſeperalibus temporibus, &c. graviter langubat uſque ad 15 diem Septemb. Anno 11, ſupradicto, quo die dictus Thomas de prædictis ſeperalibus venenis obiit venenatus, &c. And albeit it did not appear of which of the ſaid poyſons he died, yet it was reſolved by all the Judges of the Kings Bench, that the indictment was good; for the ſubſtance of the indictment was, whether he was poyſoned or no. And upon the evidence it appeared, that Weſton within the time aforeſaid had given unto Sir Thomas Overbury divers other poyſons, as namely the powder of Diamonds, Cantharides, Lapis Cauſticus, and powder of Spiders, and Aqua fortis in a glyſter. And it was reſolved by all the ſaid Judges, that albeit theſe ſaid poyſons were not contained in the Indictment, yet the evidence of giving of them was ſufficient to maintain the Indictment: for the ſubſtance of the Indictment was (as before is ſaid) whether he were poyſoned or no. But when the cauſe of the murder is laid in the Indictment to be by poyſon, no evidence can be given of another cauſe, as by weapon, burning, drowning, or other cauſe, becauſe they be diſtinct & ſeveral cauſes: but if the murder be laid by one kind of weapon, as by a Sword; either Dagger, Styletto, or other like weapon is ſufficient evidence, becauſe they be al under one Claſſis or cauſe. And afterwards, Ann Turner, Sir Gervaſe Helwys, and Richard Franklyn a Phyſitian, (purveyor of the poyſons) were indicted as acceſſories before the fact done: And it was reſolved by all the ſaid Judges, that either the proofs of the poyſons contained in the Indictment, or of any other poyſon were ſufficient to prove them acceſſories: for the ſubſtance of the Indictment of them as acceſſories was, whether they did procure Weſton to poyſon Sir Thomas Overbury: and becauſe that not only Anne Turner, and Richard Franklyn, but ſome of the degree of Nobility were indicted as acceſſories in another County, viz. in the County of Midd. divers notable points were reſolved upon the ſtatute of 2 E. 6. First, if the Acceſſory be in the County of Midd. where the Kings Bench is, and the principall did the felony, &c. in another County, that the Court of the Kings Bench is within the words of that Act, viz. (and that the Iuſtices of Gaol Delivery, or Oier and Terminer, or two of them, &c.) for the cauſes and reaſons given in the Lord Zanchers caſe Lib. 9. fo. 117, 118, &c. Secondly, if the Indictment be taken in the Kings Bench, then the Juſtices ſhall not write in their own names, quia placita ſunt coram rege. Thirdly, divers preſidents were ſhewed where the Acceſſory was in the County of Midd. where the Kings Bench ſat, and the principall was attainted in another County, that the Juſtices of the Kings Bench have removed the Record of the attainder of the principall before them by Certiorari, & ſo it was done in the Lord Zanchers caſe, ubi ſupra. The like preſident was ſhewed in a caſe where the principall was attainted in the County of Dron. and the Acceſſory was in Midd. and the Kings Bench ſitting there, the Juſtices of the ſame Court removed the attainder before them by Certiorari. Fourthly, it was reſolved, that the Lord Steward of England, who is a Judge in caſe of High Treaſon, or felony committed by any of the Peers of the Realm, is within theſe words, Iuſtices of Gaol-de-

Sir Tho. Overburies caſe. Mich. 13. Jac. See before ca 7. Of murder more of this caſe.

Vide li. 9. fo. 67. Mackallies caſe Acc.

2 E. 6. cap. 24.

livery, or Oier and Terminer, because he is a Justice of Oier and Terminer, for his authority is by Commission, and the words of his Commission be after divers recitals, Et superinde, audiend, examinand, & respondere compellend, & fine debit' terminand: so as he hath power to heare and determine. And where the words be [or any two of them] that is to be intended, where there be two or more Justices, And yet where there is but one, it extendeth to him. As the Statute of Merton cap. 3. power being given to the Sheriffe in case of Redisseisin, the words be, Assumptis tecum Coronatoribus placitorum Coronæ, &c. in the Plurall number. And yet where there is but one Coroner in the County the Statute extends thereunto, and the Sheriffe shall take that one. Also the words of the statute are further, That then the Justices of Gaole delivery or of Oier and Terminer, or other there authorized: within which words, [or other there authorized] the Lord Steward is included. Fifthly, if the Record of the attainder were by Writ of Certiorari removed out of London into the Kings Bench, then there arose another doubt upon the said Statute, if afterward any proceeding should be had against any Peer, for that the words of the Statute be, The Justices, &c. shall write to the Custos Rotulorum or Keeper of the Record where such principall shall hereafter be attainted; and the attainder in this case was in London, and the Kings Bench was in Middlesex: so as if the Record should be removed into the Kings Bench in Middlesex, the Record should not be where the attainder was had; and consequently, the Lord Steward could not write to the Kings Bench. And therefore to prevent all questions, it was resolved, That in this case of the Lord Steward, no Certiorari should be granted, but a speciall Writ should be directed according to the words of the said Act to the Commissioners of Oier and Terminer in London, to certifie whether the principall was convict or acquitted: and they made a particular Certificat accordingly, so as the Record of the attainder of the principall, did notwithstanding that Certificat, remain with the Commissioners of Oier and Terminer in London: so as if any further proceeding should be had, the Lord Steward might write to them, as after he did in the case of R. Earl of S. and F. his Wife.

39 H.6.42.
23 Ass.p.7.

And it is to be observed, that the ancient wall of London (a mention whereof doth yet remain) extendeth through the Tower of London; and all that which is on the West part of the Wall, is within the City of London, viz. in the Parish of All-Saints Barking, in the Ward of the Tower of London: and all that is on the East part of the Wall is in the County of Middlesex; and the Chamber of Sir Thomas Overbury was within the Tower on the West part of the said Wall, and therefore Weston was tried within the City of London.

And where it is often said in many [a] Acts of Parliament, [b] Records, and [c] Book cases, that the King cannot put any man to answer, but he must be appriſed by Indictment, Presentment, or other matter of Record. True it is, in Pleas of the Crown or other common offences, Nusances, &c. principally concerning others, or the publick, there the King by law must be appriſed by Indictment, Presentment, or other matter of Record; but the King may have an Action for such wrong as is done to himselfe, and whereof none other can have any Action but the King, without being appriſed by Indictment, Presentment, or other matter of Record, as a [d] Quare impedit. [e] Quare incumbravit, a Writ of [f] Attaint, [g] of Debt, [h] Detinue of Ward, [i] Escheat, [k] Scire fac. pur repealer patent, &c.

a Mag.cart.ca.29
5 E.3.cap.9.
25 E.3.c.4.ſtat.5.
28 E.3.ca.3.
37 E.3.cap.18.
38 E.3.cap.9.
42 E.3.cap.3.
b Rot.clauſ.
18 H.3.m.
Rot.Parl.15 E.3.
nu.9,10. & 15.
42 E.3.nu.29.
Sir John A Lees
caſe.

17 R.2.nu.37. 2 H.4.nu.60. *c* 7 E.3.fo.26.50. Vide 6 E.3.fo.33. & 8 E.3.30 26 E.3.74.tit.reſcous 21. 43 E.3.32. per Knivet. 2 E.3.fo.7. John de Britains caſe. 3 E.3.19. 45 E.3. Decies tantum 12. *d* 5 E.2. Quar. Imp.167.33 E.3. Bře 916. *e* 17 E.3.50. 74.F.N.B.48 f.13 E.3. Juriſd.23. *f* 42 E.3.26.F.N.B. 107.D. *g* 19 H.6 47. 34 H.6.3, &c. *h* 39 H.6.26. 1 H.4.1. 15 E.3. Corody 4. *i* Regiſt. fo.165.a.F.N.B. fo.7.b. 21 H.3. Bře 882.Britton fo. 28.b.cap.18. *k* 16 E.3.Bře 651.

CAP.

CAP. LXIII.

Of Councell Learned in Pleas of the Crowne.

WHere any perſon is indicted of Treaſon or Felony, and pleadeth to the Treaſon or Felony, not guilty, which goeth to the fact beſt knowen to the party: it is holden that the party in that caſe ſhall have no councell to give in evidence, or alleage any matter for him: but for as much as ex facto jus oritur it is neceſſary to be explained, what matters upon his arraignment, or after not guilty pleaded, he may alleage for his defence, and pray councell learned to utter the ſame in forme of law. See before cap.2. Petit treaſon. fo.29.34. 9 E.4.22. Stanf.pl.cor. 151. b. otherwiſe it is in an appeale which is the ſuit of the party.

And firſt upon the arraignment what advantage he may take in caſe of High Treaſon by the Common law. If it be for compaſſing the death of the King, he may alleage, that in the Indictment there is no ſuch overt or open Act ſet down in particular, as is ſufficient in Law, or the like. For it is to be obſerved, that in no caſe the party arraigned of treaſon or felony, can pray councell learned generally, but muſt ſhew ſome cauſe. 1. 1 H.7.22.

Secondly, in caſe of High Treaſon by force of any ſtatute, he may alleage, that the Indictment being grounded upon a Statute, the Statute is either miſtaken or not purſued. 2.

Thirdly, of what matters he may take advantage equally concerning them both. He may alleage, that there was not at the time of the Indictment of High Treaſon, two lawfull accuſers, that is, two lawfull witneſſes. 3.

Fourthly, of what matters he may generally take advantage in all caſes of treaſon and felony. He may alleage, that the offence is not certainly alleaged in reſpect of the matter, time, and place, or that he is not rightly named, or have not a right addition, or that the offences were done before the laſt generall pardon. 4.

Fifthly, after he hath pleaded not guilty, what advantage he may take upon the evidence: He may alleage, that he ought to have two lawfull witneſſes in caſe of High Treaſon, to prove the fact againſt him. 5.

Sixthly, he may take advantage in arreſt of judgement, if the verdict be found againſt him, that the triall came not out of the right place: as it fell out in Arundels caſe, convicted by a Jury of wilfull murder; he informed the Court, that the Jury that tried him came out of a wrong place, and thereupon he had Councell Learned aſſigned him; who indeed found, that the Venire facias was miſawarded, and the Court thereof by the Councell being informed judgement was ſtayed. And that the priſoner may alleage theſe or the like matters, it is evident: becauſe for every matter in law riſing upon the fact, the priſoner ſhall have Councell learned aſſigned him. Alſo it is lawfull for any man that is in Court, to informe the Court of any of theſe matters, leſt the Court ſhould erre, and the priſoner unjuſtly for his life proceeded with. And the reaſon wherefore regularly in caſe of treaſon and felony, when the party pleads not guilty, he was to have no counſell, was for two cauſes. Firſt, for that in caſe of life, the evidence to convince him ſhould be ſo manifeſt, as it could not be contradicted. Secondly, the Court ought to ſee, that the Indictment, Triall, and other Proceedings be good and ſufficient in law; otherwiſe they ſhould by their erroneous judgement attaint the priſoner unjuſtly. 6. Lib.6.fo.14. Arundels caſe. 9 E.4.22. Stanf. ubi ſup. 7 H.4.34. &c. See before fo.29.

Robert Chirford counſelled the Prior of the Priory of Binham in Norfolke, that John of Leiceſter the Kings Serjeant at Armes, comming to the Priory with the Kings Writ of Privie Seale, ſhould not be admitted to the Priory: for which counſell he was indicted in the Kings Bench, and depending the Pleas upon the Indictment, the King doth pardon him: and in the Pardon is contained a Superſedeas to the Juſtices, commanding them to proceed no further. Rot. clauſ. 14 E.2. 17. 27. Octob.

CAP.

CAP. LXIV.

Of Principall and Accessory.

ALbeit Justice Stanford hath well collected the Books concerning Principall and Accessory, yet diversa desiderantur: and necessary it is, that some things touching the same should be added, which are very necessary to be knowne.

It is a sure Rule in Law, that In alta proditione nullus potest esse accessorius, sed principalis solummodo. This rule being well understood, will open the reason of divers cases, which yet are involved in darknesse.

High Treason is either by the Common law, or by Act of Parliament: we will set downe examples (which ever do illustrate) of both.

Mich. 12 & 13 Eliz. 296. Dier, Coniers case.

A. doth counterfeit the Kings coine, viz. Shillings, and C. knowing the same doth receive A. and comfort and aide him: this counterfeiting is High Treason by the Common law in A, as hath been said: and yet it hath beene holden that in this case C. hath not committed treason: for say they, in case of felony, a receiver of a felon after the felony done, knowing him to be a felon, is no principall, but an accessory; and for that there is no accessory in treason, therefore C. in the case before committeth no treason; for then in judgement of law he must be a counterfeiter of the Kings coine within our statute of 25 E. 3. which he is not: and therefore they say, this is Casus omissus, and not within any of the Classes or Heads of the said Act of 25 E. 3. But all agree, that procurors of such treason to be done before the fact done, if after the fact be done accordingly, in case of treason, are principals, for that they are participes criminis in the very act of counterfeiting.

a 19 H. 6. 47. 3 H. 7. 10. Stanf. fo. 3. See before cap. Treason. Verb. Si home counterface le grand Seale.

a But saving reformation we hold, that if any man committeth High Treason, and thereby becommeth a traytor, if any other man knowing him to be a traytor, doth receive, comfort, and aide him, he is guilty of treason, for that there be no accessories in High Treason. b And so it was resolved in the case of Abingdon, who received, comforted, and aided Henry Garnet Superior of the Jesuits, knowing him to be guilty of the Powder Treason, and accordingly Abingdon was indicted and attainted of High Treason.

b Pasch. 4. Jac. Abingdons case resolved by the Justices.

c M. 12 & 13 El. ubi supra. See before ca. 3. Of Misprision of treason.

c And where it is said, that the said offence in Conyers case was misprision of treason, that cannot be, because there was a consent, and not a concealment only: otherwise, High Treason being the highest offence, should have more favour, then felony: for the receiver and comforter in case of felony is punished by death, and so is not he that committeth misprision of treason. And lastly, this is no new treason, but a partaking and a maintaining of the old.

In case of felony there are Principals and Accessories, and Accessories be of two sorts, either before the offence be committed, or after. See the Second part of the Institutes, W. 1. cap. 14. And concerning this, there be also certaine Rules. d Nullus dicitur felo principalis, nisi actor, aut qui præsens est abettrans, aut auxilians actorem ad feloniam faciendam. But this Rule hath his exception: for e in case of poysoning, if one layeth poyson for one, or infuse it into Broth, or the like, albeit he be not present when the same is taken; and either the party intended, or any other is poysoned, yet is he a principall: and in that case, both the principall, and procurer, or accessory may be absent. See the Bookes aforesaid for accessories before the felony committed, and where and in what manner the procurement shall be said in law to be pursued: the learning whereof is so plainly set downe, as the same need not herein to be repeated. f Nullus dicitur Accessorius post feloniam, sed ille qui novit Principalem feloniam feciſſe, & illum receptavit

d 7 H. 4. 27. 21 E. 4. 71. 13 H. 7. 10. Pl. com. Lib. 4. fo. 42. in Heydons case. Lib. 9. fo. 67. Mackallyes case. & Lib. 11. fo. 5.

e Lib. 4. fo. 44. Vauxes case. Pl. com. fo. 474. Saunders case. Lib. 9. 81. Agnes Gores case. See Pasc. 32 E. 3. coram Rege Rot. 62. Ph. Cliftons case.

f 25 E. 3. 39. b. cor. 126. 26 Ass. 47. 9 H. 4. 1. 3 H. 6. 42.

receptavit & comfortavit. [a] And therefore if a man write Letters for his deliverance, or in favour of him, or the like; he is no acceſſory, for that he received not the felon.

[a] 26 Aſſ. ubi ſup.

[b] A Vicar, which inſtructed an Appruver which could not reade, whileſt he was in priſon, to reade, whereby he eſcaped, was adjudged no acceſſory to the felony.

[b] Mic. 7 R. 2. coram Rege Rot. 23. Cant. 7 H. 4. 27.

Catlyn and Browne Juſtices of Aſſiſe in the County of Suffolke put this caſe to all the Judges. [c] A man committed felony in the County of Suffolke, for which he was committed to the Gaole; and R an Attorny adviſed the friends of the felon to perſwade the witneſſes not to appeare to give evidence againſt him, which was done accordingly. And it was reſolved, that neither the friends nor the Attorny were acceſſories to the felony, but that it was a great contempt and miſpriſion, for which they might be fined and impriſoned.

[c] Mic. 11 & 12 El. the caſe of Roberts the Attorny

[d] The acceſſory cannot be guilty of petit treaſon, where the principall is guilty but of Murder. For Acceſſorius ſequitur naturam ſui principalis.

[d] See before cap. Petit treaſon.

[e] If divers commit any murder, or other felony, one man may be both principall and acceſſory to the other.

[e] 7 H. 4. 27.

See before cap. Clergie, that if the principall before attainder hath his Clergie, the acceſſory is diſcharged. And note generally, where the principall before attainder is pardoned, or his life otherwiſe ſaved, the acceſſory is diſcharged.

[f] 2 H. 4. 16.

CAP. LXV.

Of Miſpriſions divers and ſeverall: and firſt of Miſpriſion of Felony, &c.

OF Miſpriſion of treaſon we have already ſpoken, and of the Etymologie of the word. It remaineth now that we ſpeak of other Miſpriſions.

Miſpriſion is twofold: one is Crimen omiſſionis, of omiſſion, as in concealement, or not diſcovery of treaſon or felony: another is Crimen commiſſionis, of commiſſion, as in committing ſome heynous offence under the degree of felony.

Or miſpriſion is of two ſorts, viz. Paſſive, and Active: Paſſive is of the nature of concealement, whereof ſome be by the Common law, and ſome by Statute. By the Common law, as Paſſive miſpriſion, that is concealement of High Treaſon, whereof we have ſpoken; and Paſſive Miſpriſion, that is concealement of felony, whereof we are now in this Chapter to ſpeak. Some by Statute: as if any be moved to make commotion or unlawfull aſſembly, and do not within Twenty four houres declare the ſame to a Juſtice of Peace, Sheriffe, Maior, or Bailiffe, &c. Concealement by Juries, 3 H. 7. ca. 1. 33 H. 8. ca. 6, &c.

1 Mar. 1. Parl. ca. 12. 1 Eliz. cap. 17.

Now are we to ſpeak of concealement or not diſcovery of felony. As in caſe of High Treaſon, whether the treaſon be by the Common law, or Statute, the concealment of it is miſpriſion of treaſon. So in caſe of felony, whether the felony be by the Common law, or by Statute, the concealement of it is miſpriſion of felony.

See the ſecond part of the Inſtitutes. W. 1. cap. 9.

If any be preſent when a man is ſlaine, and omit to apprehend the ſlayer, it is a miſpriſion, and ſhall be puniſhed by fine and impriſonment.

8 E. 2. Cor. 395.

And as the Concealment of High Treaſon is higher by many degrees then the concealment of felony, ſo the puniſhment for the concealment of the greater is heavier then of the leſſer, and yet the concealment of felonies in Sheriffs, or Bailifs of liberties is more ſeverely puniſhed then in others, viz. by impriſonment by one year, and ranſome at the will of the King. From which puniſhment

W. 1. ca. 9. See the expoſition thereof, ubi ſup.

niſhment if any will ſave himſelf he muſt follow the advice of Bracton, to diſcover it to the King, or to ſome Judge or Magiſtrate, that for adminiſtration of juſtice ſupplieth his place, with all ſpeed that he can.

Bract. lib. 3. fo. 118. a.

Non enim debet morari in uno loco per duas noctes, vel per duos dies, nec debet ad aliqua negotia, quamvis urgentiſſima, ſe convertere, quia vix permittitur ei ut retroſpiciat.

And this is intended of a concealment, or not diſcovery of his meer knowledge: For if in caſe of High treaſon, he that knoweth it, before it be done, and aſſenteth to it, is particeps criminis, and guilty of treaſon: and in caſe of felony, he that receiveth the thief, and aſſenteth to it, is acceſſory.

See before in the Chapter of Miſpriſion of treaſon, that every treaſon and felony doth include in it miſpriſion of treaſon and felony. See the ſtatute of 23 El. ca. 1. Of miſpriſion, that is, crimen commiſſionis.

See before the chapt. of Miſpriſion of treaſon fo. 36. and of Principall and Acceſſory fo. 138.

Compaſſings, or imaginations againſt the King, by word, without an overt act, is an high miſpriſion, as before is ſaid. * In cogitatione tua ne detrahas Regi, &c. quia aves cœli portabunt vocem tuam, & qui habet pennas annunciabit ſententiam.

* Eccleſiaſtes ca. 10. v. 20.

[a] If any man in Weſtminſter Hall, or in any other place, ſitting the Courts of Chancery, the Exchequer, the Kings Bench, the Common Bench, or before Juſtices of Aſſiſe, or Juſtices of Oier and Terminer, (which Courts are mentioned in the ſtatute of 25 E. 3. De proditionibus) ſhall draw a weapon upon any Judge, or Juſtice, though he ſtrike not; this is a great miſpriſion, [b] for the which he ſhall loſe his right hand, and forfeit his lands and goods, and his body to perpetuall impriſonment: the reaſon hereof is, becauſe it tendeth ad impedimentum Legis terræ. [c] So it is, if in Weſtminſter Hall or any other place, ſitting the ſaid Courts there, or before Juſtices of Aſſiſe, or Oier and Terminer, and within the view of the ſame, a man doth ſtrike a Juror, or any other with weapon, hand, ſhoulder, elbow, or foot, he ſhall have the like puniſhment; but in that caſe, if he make an aſſault, and ſtrike not, the offender ſhall not have the like puniſhment.

a See the 2. part of the Inſtitutes W. 1. ca. 33. 25 E. 3. ca 1. It is high treaſon to kill any of the in their places.
b 22 E. 3. 13. 19 E. 3. judgment 174. Mich 6 E. 3. Coram Rege Rot. 55. Eborum. 41 E. 3. Cor. 280. Nota the forfeiture of his lands is but during his life. 41 E. 3. 25.
c Int. leges Alveredi cap. 34. 3 El. Dier 188. 2 Ja. Bellinghams caſe Coram rege with his elbow & ſhoulder.

[d] If any ſtrike in the Kings Palace, where the Kings royall perſon reſideth, he ſhall not loſe his right hand, unleſſe he draw blood; but if he draw blood, then his right hand ſhall be ſtrucken off, he perpetually impriſoned, and fined and ranſomed.

d 33 H. 8. ca. 12.

Note the law makes a great difference between a ſtroke or blow, in or before any of the ſaid Courts of Juſtice, where the King is repreſentatively preſent, & the Kings Court, where his royall perſon reſideth. For in the Kings houſe (as hath been ſaid) blood muſt be drawne, which needeth not in or before the Courts of Juſtice, but a ſtroke only ſufficeth. Again, the puniſhment is more ſevere in the one caſe, then in the other: ſuch honour the law attributeth to Courts of Juſtice, when the Judges or Juſtices are doing of that which to Juſtice appertaineth: and the reaſon is, Quia Juſticia firmatur Solium.

But note that by the ancient laws of this Realm, ſtriking only in the Kings Court was puniſhed by death. Vide Lambard inter leges Inæ ca. 6. Si quis in Regia pugnarit, rebus ſuis omnibus mulctator, & ſine morte etiam plectendus, Regis arbitrium & jus eſto. Inter leges Canuti cap. 56. Si quis in Regia dimicarit, capitale eſto, &c. Inter leges Alveredi cap. 7. Qui in Regia dimicarit, ferrumve diſtrinxerit, capitor, & regem penes arbitrium vitæ neciſque ejus eſto, &c.

e Mich. 15 El. in the caſe of Peter Burchet Eſquire of the middle Temple.

[e] Peter Burchet priſoner in the Tower, ſtroke within the Tower John Longworth his keeper (who ſtood in a window reading of the Bible) with a billet on the head behind, whereby blood was ſhed, and death inſtantly enſued: this being without any provocation was adjudged murder, for which he was attainted, and before his execution (which was in the Strand over againſt Somerſet houſe) his right hand was firſt ſtrucken off, by force of the ſtatute of 33 H. 8. for that the Tower was one of the Queens ſtanding houſes or Palaces.

The Kings Palace at Weſtminſter hath this liberty and privilege, viz.

Nullæ

Nullæ citationes, aut ſommonitiones liceant fieri cuicunque infrà Palatium Regis Weſtm. Paſch. 8 E. 2. Coram rege Rot. 28 Norff.

Like priviledge hath Weſtminſter Hall, or other place, where the Kings Juſtices, &c. ſit, as by theſe following Records appeareth.

[a] Qu'a Bedellus Univerſitatis citari fecit Wil. de Wivelinghã infra oſtium aulæ Weſtm', Juſticiariis ſedentibus, ad comparend' coram Cancellario, &c. pro quo ſe poſuit in graciam Regis, committitur Gaolæ, & Henricus de Harwood, ad cujus ſectam proſecutus fuit, committitur Mariſchal. & finem fecit 40.s. *a* Mich. 12 E. 3. Coram Rege Rot. 101. Cant.

[b] Matilda de Nyerford, filia Willielmi de Nyerford militis defuncti, did libell againſt Iohn Earl of Warren, & [c] Iohan de Barro Countes of Warren the Kings niece (in camitina dominæ Reginæ Conſortis domini Regis) in a cauſe of matrimony and divorce, and the ſame Iohan de Barro was cited in the Kings Palace at Weſtminſter, &c. It was upon full examination of the cauſe, adjudged in Parliament in theſe words, Quòd prædictum Palacium domini regis eſt locus exemptus ab omni juriſdictione ordinaria, tam regiæ dignitatis & coronæ ſuæ, quam libertatis Eccleſiæ Weſtm', & maximè in præſentia ipſius domini Regis tempore Parliamenti ſui ibidem: ita quòd nullus ſummonitiones, ſeu citationes ibidem faciat, & præcipuè illis, qui ſunt de ſanguine domini Regis, quibus major reverentia, quam aliis fieri debet, &c Conſideratum eſt, quòd officiar' committatur Turri London, & ibidem cuſtodiatur ad voluntatem domini Regis. *b* Placita coram domino rege in Parliamento ſuo apud Weſtm' in præſentia domini regis. An. 21 E. 1. *c* Ellanor daughter of E. 1. married with William Earl of Barry alias Barro in France, and had iſſue the ſaid Johan who married John Earl Warré.

Here two things are principally to be obſerved: Firſt, that this royall priviledge is not only appropriated to the Palace of Weſtminſter, but to all the Kings Palaces, where his royall perſon reſides. Secondly, that this priviledge is to be exempted from all Eccleſiaſticall juriſdiction, regiæ dignitatis & coronæ ſuæ ratione, &c.

If any doe reſcue a priſoner in or before any of the aboveſaid Courts committed by any of the aforeſaid Juſtices, it is a great miſpriſion, for which he and the priſoner aſſenting to it, ſhall forfeit their lands and goods, and their bodies to perpetuall impriſonment, but ſhall not loſe his hand, becauſe no ſtroke or blow was given. 22 E. 3. 13.

But it was reſolved by all the Judges, that where Thomas Oldfield, ſitting the Court of the Dutchy of Lancaſter, with a knife ſtabbed one Ferror a Juſtice of Peace in the view of the ſaid Court, that the Court of the Dutchy was none of the Courts to make it a miſpriſion to loſe his right hand, &c. but the offender was to be indicted, and grievouſly fined. Trin. 8 Jac. regis Oldfields caſe.

And in 9 El. one Guirling ſtroke another in the White hall, ſitting the Maſters of Requeſts, and it was then reſolved by the Court of Kings Bench, that it was not any miſpriſion, for the which he ſhould loſe his right hand, &c. but he was indicted and fined. Paſch. 9 Eliz. Guirlings caſe.

Quia Thomas de Holbroke manus violentas impoſuit ſuper Iohannem de Loudham, &c. ad Seſſionem ſuam ſedentem apud Gipwicum, & eum dementitus eſt, committitur in Parliamento Turri London, & finitur 20. li. & invenit ſex milites manucaptores pro bono geſtu ſuo. Hil. 13 E. 3. Coram rege Rot. 104. Suff.

And where ſome of the books aboveſaid ſay, that the offender ſhall forfeit his lands, and ſome that he ſhall be diſherited, yet the forfeiture of his lands is only for tearm of his life, (as before is ſaid;) for being no felony, the blood is not corrupted, nor the heir diſinabled to inherit. And this ſevere puniſhment is at the ſuit of the King, and the party may have his action, and it ſhall be tried by the officers and criers. And for ſuch a ſtroke Thomas of Whitteſley recovered five hundred pounds, Trin. 9 E. 3. Rot. 154. Midd. Trin. 9 E. 3. Rot. 154. Midd.

Britton ſaith, Aſcuns treſpaſſes ſont nequedent pluis puniſhable, ſi come treſpas fait en temps de peace a * Chivaliers, ou auters gents honorables per Ribaws, ou auters viles perſons; En quel caſe nous volons, que ſi Ribawe ſoit attaint al ſuit de cheſcun Chivalier, que il eyt ferue per felony ſans deſart del Chivalier que le Ribawe perd ſon pome dont il treſpaſſa: ſo great a reſpect in thoſe daps was had of honour and order. Ribawe is taken here for a Raſcall Ruffian. There is a great miſpriſion when any revenge is ſought againſt a Judge, Juſtice, Brit. ca. 25. fo. 47. * Nota for the dignity of Knights.

ſtice, Officer, Iuror, Serjeant, Counſellor, Miniſter, or Clerk, for that, which they doe in diſcharge of their ſeverall duties, offices, and places, concerning the adminiſtration of Juſtice.

Mich. 33 & 34 E. 1. Coram Rege Rot. 75.

Roger de Hegham and others being Juſtices of Oier and Terminer, and ſitting in the Exchequer chamber, gave judgement for Mary late the wife of William Brewſe Plaintif, againſt William le Brewſe Defendant, which judgment was pronounced by Roger de Hegham. William de Brewſe demanded of Roger de Hegham if he would avow the judgement, and ſaid, Roger, Roger, now thou haſt thy will which of long time thou haſt ſought: of whom Roger de Hegham demanded, what is that? To whom William de Brewſe ſaid, my ſhame, and my loſſe, and this I will reward or recompence, or I will think of it. Whereof he being indicted and arraigned, and confeſſing the offence, the Record ſaith, Et quia ſicut honor, & reverentia, qui miniſtris domini regis ratione officii ſui faciuntur, ipſo regi attribuuntur; ſic dedecus & contemptus miniſtris ſuis fact' eidem domino regi inferuntur; Conſideratum eſt quòd præd. Willielmus de Brewſe, diſcinctus in corpore, capite nudo, tena depoſita, eat e banco domini regis ubi placita tenentur in aula Weſtm', per medium aulæ prædict', cum curia plena fuerit, uſque ad Scaccarium (ubi deliquit) & ibidem veniam petat a præfato Rogero, &c. et poſtea committitur Turri London, ibidem moratur', ad voluntatem regis.

Note.

Note this exemplary judgement againſt a gentleman of a great and honourable family. Quælibet pœna corporalis, quamvis minima, major eſt qualibet pœna pecuniaria. And in that Record it is ſaid, Quòd dominus rex filium ſuum primogenitũ, & chariſſimũ Edwardum Principẽ Walliæ, pro eo quòd quædam verba groſſa cuidam miniſtro ſuo dixerat, ab hoſpitio ſuo ferè per dimidium anni amovit, nec ipſum filium ſuum in conſpectu ſuo venire permiſit, quouſque dicto miniſtro de dicta tranſgreſſione ſatisfecerat.

Bract. lib. 2. 105. Theſe words were given to the Treaſurer of England by the procurement of Pierce of Gaveſton.

Hil. 20 E. 3. Coram Rege Rot. 160.

Quia Petrus de Scales minatus fuit Ricũm de Worlingworth, qui fuit de conſilio Johannis de Moten, de vita & membris, dictus Petrus invenit plegios de bono geſtu ſuo.

There be many Records for abuſing of Jurours, viz. Paſch. 10 E. 3. Coram Rege, Rot. 87, Gilbertus Twiſt. Paſch. 26 E. 3. ibidem, Rot. 22. Eſſex, Tho. Hubberd Hil. 7 H. 5. ibidem, Rot. 24. Ricũs Cheddre. Mich. 17 E. 2. Coram Rege Rot. 63.

Percuſſio clerici curiæ in veniendo verſus curiam, &c. Trin. 11 E. 2. Coram Rege, Rot. 42. London. Not only theſe particular revenges aboveſaid, but all other of what kind ſoever are great miſpriſions.

Cap. Irineris 5. ultimo.

Alſo when any revenge is ſought againſt any man for complaining in any of the Kings Courts, ſuper gravaminibus, &c. for grievances, &c. Quia deterret homines a querelis ſuper gravaminibus in forma juris. De hiis qui vindictam fecerint, eo quod aliquo modo ſuper prædictis gravaminibus in curia domini regis conqueſti fuerunt.

Paſc. 10 E. 3. Coram Rege Rot. 86. Linc.

Juſticiarii taxaverunt damna 2 Marc' ſuper Willielmum Botesford, eo quòd minabatur quandam Hawiſiam de vita & membris, eo quòd ipſa proſequebatur ipſum in placito tranſgreſſionis.

Inter leges Inæ cap. 9. Lamb.

We will conclude this point for private revenge with an ancient law before the Conqueſt. Si quis privato conſilio illatam ſibi injuriam vindicarit, antequam jus æquum ſibi dari poſtulaverit, quod nomine vindictæ eripuit reddito, integrum rei pretium præſtato, & 30 ſolidos dependito.

See the 4. part of the Inſtit. cap. Chancery. Artic. Verſ. Cardinall Woolſey. Art. 4, 5, 6. 11. 41.

See in the Fourth part of the Inſtitutes, cap. Of the Chancery, in the Articles againſt Cardinall Woolſey. Artic. 4, 5, 6, 11. 41.

CAP.

CAP. LXVI.

Of Conſpiracie.

Conſpiracie [a] is a conſultation and agreement betweene two or more, to appeale, or indict an Innocent falſely, and maliciouſly of felony, whom accordingly they cauſe to be indicted or appealed; and afterward the party is lawfully acquited by the verdict of twelve men: the party grieved may be relieved, and the offender puniſhed two wayes. Firſt, by a Writ of conſpiracy, which is a civill or common Action at the ſuit of the party, wherein the plaintife ſhall recover damages, and the defendant ſhall be impriſoned. Secondly, by Indictment at the ſuit of the King, the judgement whereof is criminall; of which we are now to ſpeak.

[a] Vide ſtatut. de conſpiratoribus, Anno 21 E. 1. vet. Mag. Cart. part 1. fo. 111. & definition conſpir. 33 E. 1. ibid. fo. 90. b. Artic. ſup. Cart. cap. 10. F. N. B. 114, 115. Stanf. pl. cor. 172, &c. Lib. 4. fo. 45. Lib. 9. fo. 16. 56, 57 78.

[b] Upon this ſuit of the King, if the offenders be convicted, the judgement is grievous & terrible, viz. That they ſhal loſe the freedome or franchiſe of the Law, to the intent that he ſhall not be put or had upon any Jury or Aſſiſe, or in any other teſtimony of truth: and if they have any thing to do in the Kings Courts, they ſhall come [c] per ſolem, id eſt, by broad day, and make their Attorny, and forthwith return by broad day: And their houſes, lands, and goods, ſhall be ſeiſed into the Kings hands, and their houſes and lands eſtrepped and waſted, their trees rooted up and erraſed, and their bodies to priſon: all things retrograde, and againſt order and nature, in deſtroying all things that have pleaſured or nouriſhed them; for that by falſehood, malice, and perjury, they ſought to attaint and overthrow the innocent. Which judgement in our Books is called, a villanous judgement. Firſt, in reſpect of the villany and ſhame, which the party hath which receiveth it. Secondly, for that by the judgement he loſeth the freedome and franchiſe of the Law, and therefore undergoeth a kinde of bondage and villany. And the reaſon of this heavie and terrible judgement is: 1. For that the offenders have conſpired and plotted the death and ſhedding of the blood of an Innocent. 2. That they do it under faire pretence of Juſtice, and by courſe of law, which was inſtituted for the protection and defence of the innocent. 3. That if they had attainted the innocent, he ſhould have loſt his life, (by an infamous death) his lands, his goods, and his poſterity; for his blood thereby ſhould have been corrupted, &c. 4. All this falſhood, malice, and perjury is committed in placito Coronæ, in a ſuit for the King, which aggravateth and increaſeth the offence; for that the King is the Head of Juſtice, and a protector of the innocent: and therefore at the Kings ſuit, and not at the ſuit of the party, this villanous judgement ſhall be given. So as the law hath excellently diſtributed the remedies; the private action of the party to give him damages, &c. and the ſuit of the King for exemplary puniſhment. And it is to be obſerved, that this Villanous judgement is given by the Common law, (as in the caſe of Attaint) and not by force of any Statute.

[b] 24 E. 3. 45. 27 aſſ. 43 E. 3. Conſpiracy. 11. 59. 4 H. 5. Judgment 120. the like judgement as in attaint. See the firſt part of the Inſtitutes. Sect.

[c] Trin. 18 E. 3. coram Rege. Rot. 148. Paſch. 32 E. 3. coram Rege. Rot. 58.

King E. 3. demanded of his Juſtices and Serjeants, whether divers men being indicted of conſpiracy for the indicting of R. of felony, were mainpernable or no? And they anſwered the King expreſly, that they were not, in reſpect of the odiouſneſſe of the offence.

27 Lib. aſſ. p. 12.

CAP. LXVII.

Of Penſions, &c. received by Subjects, of Foraine Kings, &c.

IT is not lawfull for any ſubject of the King of England to take a Penſion, &c. of any foraine King, Prince, or State (without the Kings licenſe) albeit they be in league with the King of England; both, for that they may become enemies, and for that alſo it is miſchievous and dangerous to the King himſelfe and his State, as it appeareth by this Diſtichon.

Principe ab externo veniunt lethalia dona,
Quæ ſtudii ſpecie, fata, necemque ferunt.

And this was (ſay they) the caſe of the Lord Haſtings Chamberlaine to King E. 4. who in the Fifteenth year of his raign, received a Penſion of two thouſand Crowns yearly from the French King: who being informed by Juſt. Catesbye his inward friend, and others learned in the law, that the receiving hereof was an offence againſt Law, being deſired by Pierce Clerett a Frenchman (who paid the Penſion) to make him an acquitance for receipt thereof for his diſcharge, utterly refuſed the ſame. This Report I do the rather hold to be true, for that all our Engliſh Hiſtorians, (who for the moſt part rehearſe but the carkaſſe or outſide of any point in Law) give great credit hereunto. And what ill conſequence this and other like Penſions, and others of the Councell of King E. 4. had, you may reade in our Hiſtories.

See the caſe in 7 R. 2. of [a] Spencer Biſhop of Norwich; and there alſo the caſe of [b] Pierce Creſſingham, and others: and of [c] Sir William Ellingham and others, puniſhed for receiving of money, &c. of the French King, which drew them without the Kings licenſe, to yeeld up Caſtles and Forts in France committed to their cuſtody, puniſhed by Fine and Impriſonment.

See the fourth part of the Inſtitutes, cap. Of the Chancery, Artic. 27. Againſt Cardinall Woolſey.

See the fourth part of the Inſtitutes, cap. the Chancery Artic. againſt Cardinall Woolſey, Art. 27. Vide Parl. 7 R. 2. nu. 16. Mat. ca. 26. v. 24. *Nemo poteſt duobus dominis ſervire: aut enim unum odio habebit, & alterum diliget, aut unum ſuſtinebit, & alterum contemnet.* 4 Regum ca. 5. v. 26, &c. Geheſi. See 3 Jac. ca. 5. concerning the ſervice of a Subject as a Souldier or Captain to a forain Prince, hereafter cap. Fugitives. *Polydor. Hall. Hollingſhed. Stowe, &c.*

[a] Rot. Parl. 7 R. 2. nu. 15. 18, 20, 21, 22, 23. [b] Ibid. nu. 17. [c] Ibid. nu. 24.

CAP.

CAP. LXVIII.

Of Bribery, Extortion, Exaction, &c.
And firſt of Bribery.

BRibery is a great miſpriſion, when any man in Judiciall place takes any Fee or Penſion, Robe, or Livery, Gift, Reward, or Brocage of any perſon, that hath to do before him any way, for doing his office, or by colour of his office, but of the King only, unleſſe it be of meat and drink, and that of ſmall value, upon divers, and grievous puniſhments. Forteſcue, ca. 51.

THis word [Bribery] commeth of the French word Briber, which ſignifieth to devoure, or eat greedily, applyed to the devouring of a corrupt Judge, of whom the Pſalmiſt ſpeaking in the perſon of God, ſaith, Qui devorat plebem meam ſicut eſcam panis. Qui cognoſcit faciem in judicio, non bene facit: iſte pro buccella panis deſerit veritatem. Pſalm. 13. 4. Prov. 28. 21.

But let us peruſe the Branches of this deſcription.

¶ A great miſpriſion] But it may be objected, that Bribery in a Judge was ſometime adjudged a higher offence. For whereas at the Aſſizes holden at Lincolne in the 23 yeare of E. 3. an Exigent was to have been awarded againſt Richard Saltley, Hildebrand Boreſward, Guilbert Holliland, Thomas Derby, and Robert Dalderby, who formerly had been indicted of divers felonies before Sir William Thorpe, Chiefe Juſtice of the Kings Bench, and one of the Juſtices of Aſſize of the ſaid County of Lincolne, he the ſaid Sir William Thorpe, to ſtay the ſaid Writ of Exigent againſt them, Cepit munera contra juramentum ſuum, viz. of Richard Saltly, 10 li. of Hildebrand 20 li. of Holliland 40 li. of Derby 10 li. and of Dalderby 10 li. King Edward the Third appointed the Earles of Arundell, Warwick, and Huntingdon, and two Lords, the Lord Grey and the Lord Burghers' to examine this matter. Before whom Sir William Thorpe being charged with the ſaid Bribery, Non potuit dedicere, &c. Now the Record ſaith. Conſideratum eſt per dictos Juſticiarios aſſignatos ad judicand ſecundum voluntatem domini Regis, & ſecundum regale poſſe ſuum, quòd quia prædictus Willielmus de Thorpe, qui ſacramentum domini Regis quod erga populum ſuum habuit cuſtodiendum, fregit malicioſe, falſe, & rebelliter in quantum in ipſo fuit, & ex cauſis ſupradictis per ipſum Willielmum, ut prædictum eſt, expreſſe cognitis, ſuſpendatur, & quod omnia tra, & tenta, bona & catalla ſua remaneant forisfacta. This ſentence ſeemeth to have his foundation as well upon the oath of the Judges, (for the Record ſaith) contra juramentum ſuum, and the concluſion of the Oath, And in caſe ye be found in any default in any of the points aforeſaid, ye ſhall be *ad voluntatem Regis*, of body, lands, and goods, thereof to be done as pleaſeth him: As alſo for that this laſt clauſe is enacted by authority of Parliament (as they ſay) in Anno 20 E. 3. And hereupon they the ſaid Lords were appointed to judge ſecundū voluntatem domini Regis, & regale poſſe ſuum, according to the words of the Oath and Act of Parliament. And this judgement was repeated in Anno 25. to the Lords, and affirmed by them. Rot. Par. Anno 24 E. 3. part 3. m. 2. & Rot. Par. Anno 25 E. 3. part 1. m. 17. Rot. Parl. 25 E. 3. nu. 10. 23 E. 3. Anno 24 E. 3. The Oath of the Juſtices Anno 18 E. 3. 20 E. 3. cap. 1.

This preſident is not to be followed at this day for divers cauſes. Firſt, it ſeemeth by the violation of the Kings Oath, and of this word [rebelliter] and by the forfeiture of all his lands and tenements to the King, that this offence ſhould be

be treason against the King, and then it being either High Treason, or Petit Treason, it is taken away by the statute of 25 E. 3. De proditionibus, the same being none of them, that are there expressed. And in all the Record this word [felonice] is not to be found, as it ought to have been, if it had been felony.

Neither by the words of the Oath, or of the supposed Act of 20 E. 3. can the judgement (quòd suspendatur) be warranted: for these words [to be at the Kings will for body, &c.] cannot be extended to losse of life, no more then the Statute of Carlisle (sub forisfactura omnium, quæ in potestate sua obtinet) extendeth not to forfeiture of life, but to imprisonment, &c. viz. losse of liberty, &c.

Anno 35 E. 1. the stat. of Carlisle.

But at this Parliament, viz. in Anno 20 E. 3. taking in hand of quarrels, other then their own, and maintenance of them is prohibited upon the paines aforesaid, viz. the paines contained in the said supposed Act of 20 E. 3. cap. 1. upon paine to be at our will, body, lands, and goods, to do thereof as shall please us: which without question was never extended to losse of life, &c. but to imprisonment, as common experience daily teacheth. For Hæc est voluntas Regis, viz. per Justiciarios suos & per legem, &c. Therefore as by the Record appeareth, Sir William Thorpe was pardoned and restored to all his lands. And we were desirous to see the Record of the Act of 20 E. 3. cap. 1. but there is no Record of any such Act in the Parliament Roll. And the very frame and composition of it seemeth to be but a rehearsall of a Commandement from the King: for the letter of it beginneth. First, we have commanded all our Justices, that they shall from thenceforth do equall law, &c. and therefore justly omitted out of the Parliament Roll of Acts of Parliaments: and yet the imprinting of it necessary, for that the fourth Chapter of this Parliament hath reference to the paynes contained in it.

20 E. 3. cap. 4.

2 R. 3. fo. 11.

See 8 R. 2. cap. 3. Rot. Parl. 10 R. 2. nu. 24.

Vid. 1 H. 4. nu. 99. & Nota.

It is enacted by Parliament *Anno* 11 *H.* 4. in these words.

Rot. Parl. Anno 11 H. 4. nu. 28. never imprinted.

Item, *Que nul Chancelor, Treasorer, Garden del Privie Seal, Counselor le Roy, Serñts a counsell del roy, ne nul auter Officer, Iudge ne ministre le roy, pernants fees ou gages de roy pur lour ditz offices ou services, preigne en nul manner en temps à vener ascun manner de done ou brocage de nulluy pur lour ditz offices & services a faire, sur peine de respondre au roy de la treble que isint preignont, & de satisfier la partie, & punys al volunt le roy, & soit discharges de son office, service, & councel pur touts jours, & que chescun que voiera pursuer en la dit matter, eyt la suite cibien pur le roy, come pur luy mesme, & eit la tierce part del somme, de que la partie est duement convict.*

By this Act of Parliament, which is the judgement of the whole Parliament, it appeareth, that, if that which is imprinted as the first Chapter of 20 E. 3. had been an Act of Parliament, then this statute of 11 H. 4. would never have inflicted this kinde of punishment, which is other, and farre lesse, then that which is mentioned in 20 E. 3. And where it is said in this Act of 11 H. 4. (& punis al volunt le roy) that is, by fine and imprisonment by the Court where the conviction shall be; for, as hath been said, Hæc est voluntas Regis. viz. per Justiciarios suos, & legem suam, & non per dominum regem in camera sua, vel aliter.

2 R. 3. 11. a.

So as by warrant of this Act of Parliament we have said, that Bribery is a Misprision; for that it is neither treason, nor felony; and it is a great Misprision, for that it is ever accompanied with Perjury.

* Plac. de Parl. apud Asherugg in Cro Ep. anno 19 E. 1.

* True it is, that Sir Thomas Weyland, Chief Justice of the Court of Common pleas, was attainted of felony, but it was not for Bribery, but being guilty of

Et Hollingsh. Chron. pag. 284, 285. he confessed felony, and abjured.

of being accessory to murder, for the which by the Common law he was abjured the Realm.

Likewise Adam de Stratton Chief Baron of the Exchequer a man of great possessions and riches was attainted of felony by him committed, all which I collect upon Records of Parliament the surest guides. For in the Parliament holden in 18 E.1. in the same year when he was attainted, I find two petitions, one preferred by himself in these words, Adam de Stratton petit graciam regis, quòd restituatur ad aliquam partem terrarum suarum, & de bonis suis quæ habuit tempore quo fuit * viz. 26000.li. Rot. Parl. 18 E.1. fo 5 nu.61. * There is a space left in the Record.

The other by Margaret de Boteler in these words, Margareta quæ fuit uxor Joh. de Boteler, de quia Adam de Stratton tenuit 1011.li. 10.s. in London, clamat habere ut eschaet'. Respons. Rex non concessit; quia in civitate nulla est eschaeta nisi regis. And at the same Parliament fo. 3. it is resolved, non sunt nisi tres formæ brevis de Eschaeta; Quia utlagatus, vel suspensus, vel abjuravit regnum. And by consequence Adam de Stratton seeing his lands escheated, must have the judgement of one of these three. Which we have added to answer secret objections that might be made out of the mistakings of our Chronicles. Et ibid. nu. 69.

The rest of the Justices were removed, fined, and imprisoned, saving Johannes de Mettingham, and Elias de Beckingham, who to their eternall memory and honour were found upright, and free from all bribery and corruption. Rot. Parl. 20 E.1. fol. 5.

It was petitioned in Parliament, that the statutes whereby the Justices of the one bench or the other should take no reward, nebe of any mans fee, may be observed. The Kings answer was, [The King hath and will charge such Justices to minister right, and will punish the contrary, & therefore willeth that all statutes made touching them and the Barons of the Exchequer, be made void.] 10 R.2. nu.24.

¶ When any man in judiciall place, &c.] For the difference between bribery and extortion is, that bribery is only committed by him, that hath a judiciall place, and extortion may be committed both by him that hath a judiciall place, or by him that hath a ministeriall office.

And this offence of bribery may be committed by any that hath any judiciall place either Ecclesiasticall or Temporall. Non accipies personam nec munera, (and the reason is expressed by the Holy ghost) quia munera excæcant oculos sapientum, & mutant verba justorum. Deut. 16.19.

If bribery hath so great force, as to blinde the eyes of the wise Judge, and to change the words of the just, Beatus ille, qui excutit manus suas ab omni munere. Iudex debet habere duos Sales; Salem Sapientiæ, ne sit insipidus, & Salem Conscientiæ, ne sit diabolus.

Though the bribe be small, yet the fault is great: and this appeareth by a Record in the reign of E.3. Quia diversi Justiciarii ad audiendum & terminandum assignat' ceperunt de Iohanne Berners qui indictatus fuit, 4. li. pro favore habendo die deliberationis suæ, finem fecerunt domino regi per iiii M. marcas, so as they paid for every pound a thousand marks. See before Sir William Thorps case. Rot. Parl. 7 R. 2. the Chancellour was accused of a bribe of ten pound, and his man four pound and certain fish, which, though the things were small, yet it had been punished, if it had been proved. Pasch. 17 E.3. Coram Rege. Rot. 139. Essex. John Berners case. Rot. Parl. 7 R.2. nu. 12, 13.

¶ Take any fee, robe, gift, or reward.] This is warranted by the oath abovesaid. Anno 18 E.3.

But admit the party * offereth a bribe to the Judge, meaning to corrupt him in the cause depending before him, and the Judge taketh it not, yet this is an offence punishable by law in the party that doth offer it. Since these Institutes so was it resolved in the Star-chamber, Trin. 6 Car. Reg. in an information against Bonham Norton and others.

¶ Brocage.] There is good warrant for this word by the said Act of 11 H.4.

¶ Of any person that hath to doe before him any way.] This hath his ground upon the oath aforesaid, so as bribery may be committed not

not only when a ſuit dependeth in foro contentioſo (as it was in the caſe of Sir Fr. Bacon Lo. of S. Alban Lo. Chancellour of England, who for many exorbitant and ſordid briberies was ſentenced by the Lords of Parliament, which you may read Rot. Parl. Anno 19 Jacobi regis) but alſo when any in Judiciall place doth any thing virtute or colore officii, though there be no ſuit at all. For example, if the Lord Treaſurer for any gift or bracage, ſhall make any Cuſtomer, Controller, or any Officer or Miniſter of the King, this is bribery, for he ought to take nothing in that caſe by the ſtatute of 12 R. 2. but that he make all ſuch Officers and Miniſters of the beſt, and moſt lawfull men, and ſufficient for their eſtimation and knowledge. (An excellent law tending greatly to his Majeſties advantage, to the good uſage and incouragement of Merchants, &c. and generally to the advancement of commerce, trade, and traffique, the life of this Iſland.) Read this ſtatute, for it is of a large extent, and the ſtatute of 5 E. 6. for they are Laws made contra ambitum, and worthy to be put in execution, for they prevent bribery and extortion: for they that buy, will ſell.

2 R. 2. ca. 2. See the ſtatute of 5 E. 6. ca. 16.

Vendit Alexander claves, altaria ſacra:
Vendere jure poteſt, emerat ille prius.

And that ſtatute of 5 E. 6. doth extend as well to Eccleſiaſticall offices, as Temporall, which concern the adminiſtration & execution of juſtice. And it was reſolved in the caſe of Doctor Trever Chancellour of a Biſhop in Wales, that both the office of Chancellour and Regiſter of the Biſhop are within that ſtatute, becauſe they concern the adminiſtration of juſtice.

Hil. 8 Ja. In Communi banco D. Trevers caſe. See hereafter ca. of Simony, and the 1. part of the Inſtit. Sect. 378. fo. 234.

* L. Earl of M. Lord Treaſurer of England took colore officii divers bribes, &c. And namely where the Farmers of the Cuſtomes exhibited a petition to have certain juſt allowances, which his Majeſty referred to the ſaid Lord Treaſurer, who long delayed the petitioners, untill they gave him ſeverall bribes, and then he gave way to relieve them. For this, and other his briberies, extortions, oppreſſions, and other grievous miſdemeanours in his ſeverall offices of the Lord Treaſurer, and Maſter of the Court of Wards (no ſuit being in any of thoſe caſes depending) upon complaint, and charge of the Commons in this Parliament, and after evident proof and often hearing of the cauſe, the Lords of Parliament (the Lord Treaſurer being brought to the bar by the Gentleman Uſher and Serjeant at Arms, and kneeling till he was commanded to ſtand up) upon the petition of the Commons by the Speaker gave this judgment againſt him by the mouth of the Lord Keeper in theſe words. This High Court of Parliament doth adjudge. Firſt, that you L. Earl of M. now Lord Treaſurer of England ſhall loſe all your offices which you hold in this Kingdome. 2. And ſhall be for ever uncapable of any office, place, or imployment in this State and Common-wealth. 3. And that you ſhall be impriſoned in the Tower of London during the Kings pleaſure. 4. And that you ſhall pay to our Soveraign the King the fine of 50000. li. 5. And that you ſhall never ſit in Parliament any more. 6. And that you ſhall never come within the Verge of the Kings Court, as by the ſaid Roll of the Parliament appeareth, which is worthy of your reading at large.

* Rot. Parl. 21 Ja. regis.

Anno 21 H. 8. Artic. 18.

In anno 21 H. 8. By Articles under the hands of all the Lords of the Priby Councell, (whereof Sir Thomas Moor then Lord Chancellour was one) and of the principall Judges of the Realm, which I have ſeene, Cardinall Woolſey was charged with divers briberies, namely in the eighteenth Article, in theſe words. Alſo the ſaid Lord Cardinall conſtrained all Ordinaries in England, yearly to compound with him, or elſe he would uſurp half, or the whole of their juriſdiction by prevention, not for good order of the Dioces, but to extort treaſure: for there is never a poor Archdeacon in England but that he paid to him a yeerly portion of his living.

21 H. 8. ca. 5. Vide 2 R. 2. Rot. Parl. nu 46.

If any Ordinary, &c. having power by the Act of 21 H. 8. to grant the adminiſtration of the goods of him that dieth inteſtate, or as inteſtate, to the widow or next of kin, &c. take any reward for preferring of any perſon, before another, to the adminiſtration, it is Bribery.

Si

Si quis contra fas & leges adminiſtrarit, vel pro odio, quod in alium habuerit, judicarit perperam, aut denique nummarium ſe Judicem præbuerit, proprii capitis æſtimatione Anglorum jure regi damnatur, niſi quidem legum id accidiſſe inſcitia, &c.

The law before the Conqueſt. Inter leges Canuti cap. 13.

CAP. LXIX.

Of Extortion, Exaction, &c.

THis is another great [a] Miſpriſion becauſe it is accompanied with perjury. Hereof you may read in the Firſt part of the Inſtitutes Sect. 701. See alſo in the Second part of the Inſtitutes W.1. cap. 26. & cap. 10. And in the Fourth part of the Inſtitutes, cap. Chancery, in the Articles againſt Cardinall Woolſey. Article 3. Extortion of Ordinaries. [b] Rannſatores hominum, extortionatores hominum: a *Rancunnier*, an extortioner of men.

[c] The Collectors of the Fifteens were committed to priſon, for that they took of every town eighteen pence for an acquitance.

[d] A Coroner was committed to priſon, becauſe he would not take the view of the dead body, before he had received for himſelf ſix ſhillings eight pence, and for his Clerk two ſhillings, and was fined at forty ſhillings.

[e] If any of the Kings Councell or his Miniſters doe eract a bond of any of his ſubjects, to come to the King with force and arms, &c. when they ſhould be ſent for, ſuch writings are to the Kings diſhonour; for that every man is bound to do to the King, as to his liege Lord, [f] al that appertaineth to him, without any manner of writing, (note the generality hereof) and ſuch writings are to be cancelled, as by the Act appeareth.

Hereupon (by Authority of this Parliament) theſe concluſions doe follow. Firſt, whatſoever any ſubject is bound to doe to the King as to his liege Lord, no bond or writing is to be eracted of the ſubject for doing thereof. Secondly, whatſoever bonds or writings are to the Kings diſhonour, are againſt law. Thirdly, whether ſuch bonds or writings be made to the King or any other, the bonds or writings be void.

[g] If a Biſhop or other Eccleſiaſticall Judge, or Miniſter, doth eract a bond or oath of any perſon in any caſe Eccleſiaſticall not warrantable by law, the bond is void, and this exaction is puniſhable by fine, &c. the Record is very long, but worthy to be read. See Rot. Parl. Anno 8 H.4. nu. 15, 16, 17, 18, 19, 20. excellent matter concerning fees in Courts of Juſtice, and in the Kings houſhold.

[h] Officialis indictatus de citando, & affligendo plurimos, non poteſt dedicere, & petit quod admittatur ad finem.

[i] Contra ſequeſtratores, commiſſarios, & alios offic' epiſcoporum pro captione feodorum, priuſquam debent pro teſtamentis probandis.

[k] The extortion of the Clergy, and of their Miniſters to be enquired of by Juſtices of Peace.

Reſolutions upon the ſtatute of 21 H.8. ca. 5.

[l] If a man makes his Teſtament in paper, and dieth poſſeſſed of goods and chattels above the value of forty pound, and the Executor cauſeth the Teſtament to be tranſcribed in parchment, and bringeth both to the Ordinary, &c. to be proved; It is at the election of the Ordinary whether he will put the Seal and Probate to the originall in paper, or to the tranſcript in parchment: but whether he put them to the one or the other, there can be taken of the Executor, &c. in the whole but five ſhillings, and not above: viz. two ſhillings ſix pence to the Ordinary, &c. and his Miniſters, and two ſhillings ſix pence to the Scribe for

a Lib. 10. fo. 101. & 102. Beawſages caſe. See the 1. part of the Inſtitutes Sect. 701. Verb. [Extortioners] 2. part of the Inſtit. W.1. ca. 26. The 4. part of the Inſtitutes. ca. Chancery in the Articles againſt Cardinall Woolſey, Art. 3.

b Trin. 28 E. 3. Coram Rege Rot. 37. Eborum.

c Hil. 20 E. 3. Coram Rege Rot. 159. Norff.

d Ibidem in the ſame Roll.

e 1 E. 3. Stat. 2. ca. 15.

f Nota.

g Inſt. Inquiſit. apud Lanceſton Coram Rogero Loveday & Waltero de Wynborn An. 6 E. 1. Cornub.

h Mich. 22 E. 3. Coram Rege Rot. 181. Eborū.

i Hil. 23 E. 3. Coram Rege.

k Rot. Parl. 3 R. 2. nu. 38, 39. 1 H. 5. nu. 23, 24.

l Mich. 6 Iacobi Rot. 1301. in Comuni Banco. Int. Edm. Neale Informer, &c. et Iacobū Rowſe official' infra Archidiaconat' de Huntingdon Defendant per le Chief Iuſtice, Walmeſly, Warburton, Daniell, & Foſter,

for registring the same: or else the said Scribe to be at his liberty, to refuse those two shillings and six pence, and to have for writing every ten lines of the same Testament, whereof every line to contain ten inches, one penny.

For punishment of Ecclesiasticall Iudges for extortion. See Rot. de Inquisit. in Com. Eborū, Somerset, &c. Anno 4 E. 1. in Thesauro. De judicibus Ecclesiasticis dicunt, &c. Rot. Parl. 8 E. 3. nu 9. The statute of 31 E. 3. cap. 4. Pasch. 32. E. 3. Coram Rege. Rot. 27. Rot. Parl. 50. E. 3. nu. 9. 1 R. 2. nu. 109. 2 R. 2. nu. 40. 13 R. 2. nu. 38, 39. 7 R. 2. nu. 53. The statute of 3 H. 5. ca. 4.

If the Executor desire that the Testament in paper may be transcripted in parchment, he must agree with the party for the transcripting; but the Ordinary, &c. can take nothing for it, nor for the examination of the transcript with the originall, but only two shillings six pence for the whole duty belonging to him. Where the goods of the dead doe not exceed an hundred shillings, the Ordinary, &c. shall take nothing, and the Scribe to have only for writting of the Probate six pence, so the said Testament be exhibited in writing with wax thereunto affixed ready to be sealed. Where the goods of the dead doe amount to above the value of an hundred shillings, and doe not exceed the summe of forty pound, there shall be taken for the whole but three shillings six pence, whereof to the Ordinary, &c. two shillings six pence, and twelve pence to the Scribe for registring the same. Where by custome lesse hath been taken in any of the cases aforesaid, there lesse is to be taken. And where any person requires a copy, or copies of the Testament so proved, or Inventory so made, the Ordinary &c. shall take for the search, and making of the copy of the Testament or Inventory, if the goods exceed not an hundreth shillings, six pence, and if the goods exceed an hundred shillings, and exceed not forty pound, twelve pence. And if the goods exceed forty pound, two shillings six pence, or to take for every ten lines thereof of the proportion before rehearsed, a penny.

Mich. 20. Iacobi in Camera Stellata, in Sir Io. Bennets case.

When the party dies intestate, the Ordinary may dispose somewhat in pious uses, notwithstanding the said Act of 31 E. 3. but with these cautions. 1. That it be after the Administration granted, and Inventory made, so as the state of the intestate may be known, and thereby the sum may appear to be competent. 2. The Administrator must be called to it. 3. The use must be publique and godly. 4. It must be expressed in particular. And 5. There must be a decree made of it, and entred of record: So in case of commutation of penance, it must be after sentence, and mutatis mutandis, ut supra.

2 H. 4. ca. 10.

Whereas twenty, forty, or an hundred be indicted of one felony, or one trespasse, and all plead to an issue, as not guilty, the Clerk of the Crown of the Kings Bench, ought not to take for the Venire facias, or for the entring of the plea, above two shillings, but the said Clerk did take for every such name by extortion two shillings. It is ordained and established, that the said Clerk of the Crown, shall take no more then hath been duly used of old time. And moreover our Soveraign Lord the King hath charged the said Justices of the Kings Bench, that no extortion be done in this behalf in the Bench aforesaid.

2 H. 4. ca. 8.

The Chirographer of the King in the Common Bench for making and writing of every Fine levied four shillings, and no more, upon pain (if he take more) to lose his office, be expelled the Court, one years imprisonment, and to pay to the party grieved his treble damages.

2 H. 4. ca. 23.

The fees to the Marshall of the Marshalsea of the Kings house, you may read in the statute of 2 H. 4. Vide 9 R. 2. cap. 5.

33 H. 8. ca. 39.

If any Auditor of the Exchequer, Dutchy of Lanc', or Court of Wards take more then three shillings four pence, for the enrolment of any Letters Patents, Decree, Grant, or Indenture of Lease, he shall forfeit, for every penny so taken, six shillings eight pence.

Munera ne capias, uncus latet hamus in esca:
Nulla carent visco munera, virus habent.

CAP.

CAP. LXX.

Of Vſury.

VSury is a contract upon the lone of money, or giving dayes for forbearing of money, debt, or duty, by way of lone, chevifance, ſhifts, ſales of wares, or other doings whatſoever. Uſura dicitur ab uſu & ære, quia datur pro uſu æris: or Uſura dicitur, quaſi ignis urens. 37 H.8.ca.9. 13 Eliz.ca.8.

And firſt, Uſury is directly againſt the law of God. And the reaſon wherefore it was permitted by the law of God for an Hebrew to an Infidell, was; becauſe it was a mean either to exterminate, or to depauperate them, as they ſhould not be able to invade, or injure Gods people. Deut.cap.21. Exo.22.Levit.25 Ezech.2. Pſal.15.

c And it is adjudged by authority of Parliament, that all Uſury being forbidden by the Law of God, is ſinne, and deteſtable. And it is alſo enacted by Parliament, that all uſury is unlawfull, that is to ſay, againſt the lawes of the Realme. Let us therefore ſee what former lawes have provided herein. c 13 Eliz.cap.8. 21 Jac.cap.17.

d Siquis de uſura convictus fuerit, omnes res ſuas amittat. d See the cuſt. de Norm. cap. 20. Int. leges S. Edw. c Glanvil. lib.7. cap.16.

e Uſurarii omnes res, ſive teſtatus, ſive inteſtatus deceſſerit, domini Regis ſunt: vivus antè non ſolet aliquis de crimine uſuræ appellari, nec convinci, ſed inter cæteras regias inquiſitiones ſolet inquiri, & probari aliquè in tali crimine deceſſiſſe per 12 legales homines de viceneto & per eorum Sacramentũ. Quo probato in Curia, omnes res mobiles, & omnia catalla, quæ fuerunt ipſius uſurarii mortui, ad uſus domini Regis capientur, penes quemcunq; inveniantur res illæ. Hæres quoq; ipſius, hac eadem de cauſa exhæredatur ſecundum jus regni; & ad dominũ, vel dominos revertetur hæreditas. Sciendum tamen, quod ſi quis aliquo tempore uſurarius fuerit in vita ſua, & ſuper hoc in patria publice defamatus, ſi tamen à delicto ipſo ante mortem ſuam deſtiterit, & pœnitentiam egerit; poſt mortem ipſius, ille, vel res ejus lege uſurarii minime cenſebuntur. Oportet ergo conſtare quòd uſurarius deceſſerit aliquis ad hoc, ut de eo tanquam de uſurario poſt mortem ipſius judicetur, & de rebus ipſius, tanquam de rebus uſurarii diſponatur.

Vide leſtatute de Merton cap. 5, & Fleta lib. 2. ca. 50. f Manifeſtus uſurarius eſt inteſtabilis. Merton. cap. 5. f Fleta lib. 2. cap. 50.

g Et inter les conſtitutions ordeins p les viels royes Alfred, &c. ordeine fuit que les chattels des uſurers fuiſſent al Roy, & que les heritages des uſurers remeiſſent eſcheats al ſeigniors des fees, & ne ſert' interre in Sanctuary. g Mirror cap. 1. § 3. & cap. 5. §. 1. Parl. 50 E. 3. nu. 58.

h Item, atrox injuria eſt, quæ omnium mobilium amiſſionem confert & legem liberam aufert, quæ locum habet in uſurariis chriſtianis. h Fleta lib. 2. c. 1.

i Ad 16 Artic. de uſuris reſpondetur: Quod licet Epiſcopis pro peccato illo penitentiam uſurario injungere ſalutarem. Sed quia committendo uſuram, uſurarius furtum committit, & ſuper hoc eſt convictus, catalla & tre uſurarii, ſicut catalla furis, ſunt regis, & ſi qui ſequi voluerint contra hujuſmodi uſurarium, reſtituantur eis bona ſua, quæ ipſi uſurarii per uſuram extorſerunt. i Rot. Parliam. 51 H.3. Petitiones Cleri.

k And it appeareth by Bracton, that it was an Article of the charge of Inquiry by Juſtices in Eire De uſurariis Chriſtianis mortuis, qui fuerunt, & quæ catalla habuerunt, & quis ea habuerit. Et quòd nullus recipiet uſuram arte vel ingenio. And divers were indicted for taking of uſury before Juſtices in Eire, and ſome were pardoned by the King, and others not. k Brac. lib. 3. fo. 116, 117. Fleta lib. 2. ca. 1. Cap. itineris. vers Mag. Cart. par. 1. fo. 151. Rot. par. 3 E. 1. m. 10. 19, 20, 21, 22. 36 Rot. claus. 2 E. 1. m. 1.

In ancient time a great revenue by reaſon of the uſury of the Jewes came to the Crown: For between the 50 year of H.3. and the 2 year of E. 1. which was not above ſeven yeares compleat, there was paid into the Kings Coffers Four hundred and twenty thouſand pounds of and for the uſury of the Jews. And yet that excellent King for divers weighty reaſons worthy to be written in letters of gold, did by Authority of Parliament utterly prohibit the ſame, in theſe l Rot. par. 3 E. 1. nu. 14. 17. 26. William. Middleton reddit computum.

words. Forasmuch as the King hath perceived that many evils and disherisons of the good men of his land had come to passe by the Vsuries which the Jews have done in times past, and that many sins and offences have risen thereupon; albeit he and his Auncesters have had great profit thereby of the Jews; notwithstanding for the honour of God, and for the common profit of his people, the King hath ordained, and established, that no Jew shall take Vsury, &c. Before this time Jews were divers times banished this Realm, but still they returned again. But this wise and worthy King by Authority of Parliament banishing their Vsury, put the Jews into perpetuall exile into forain Countries, where vsury was tolerated. By which Act it appeareth that the suppression of Vsury tendeth to the honour of God, and the common profit of the people.

Vet. Mag. Cart. 2. part fo. 58, 59. Stat. de Judaismo. See the 2. part of the Institutes, Stat. de Judaismo and the Exposition upon the same.

By which Authorities and Records, and by many others that might be remembred, it appeareth that by the ancient laws of this Realm Vsury was unlawfull, and punishable, although the punishment was not always one, but sometime greater, and sometime lesser: And therefore at the Parliament holden in the fifteenth year of E. 3. It was enacted, and declared, according as it had been sometime holden, that the King and his heirs should have conusance of Vsurers after their death, and that the Ordinary of holy Church should have conusance of Vsurers alive, for as much as to them it appertain, to compell them by the censures of holy Church, for the sin, to make restitution of usuries taken against the law of holy Church. But this statute was afterward repealed, as hereafter shall appear.

15 E. 3. ca. 5.

Hil. 16 E. 3. Corã Rege Rot. 130. Norff.

Johannes Hopd convictus per Juratores pro Vsura capiend' 11. s. 8. d. pro 20. s. præstand', et hc de similibus.

Vide 26 E. 3. fo. 71. Moignes case.

Many of the Citizens of London giving over trade and traffick (which is the life of the Common-wealth, and specially of an Iland) and betaking themselves to live upon usury, Sir William Walworth being Lord Maior, by the advice of the Aldermen his brethren, took such good and strict order for the execution of laws, and for suppression of Vsury within the City of London, as the Commons in Parliament put up a petition to the King in these words, [That the order that was made in London against the horrible vice of usury, might be observed throughout the whole Realm] Whereunto the King answered; That the old law should continue.

Rot. Parl. 50 E. 3. nu. 158. Vide Rot. Parl. 6 R. 2. nu. 57. 14 R. 2. nu. 24.

After this Sir John Northampton Maior of the City of London, by the advice of the Aldermen his brethren, took more strict order for the suppression of unlawfull Vsury within the City of London: which had so good successe, as the Commons in Parliament petitioned the King in these words. The Commons pray, that against the horrible vice of usury (then termed Scheles) and practised as well by the Clergy as Laity, the order made by John Northampton late Maior of London may be executed through the Realm. Whereunto the King answered, The King willeth those Ordinances to be viewed, & if they be found to be necessary, that the same be then affirmed. And here it is to be observed, that of ancient time the notable Merchants of London detested Vsury, & Dry exchange.

Rot. Parl. 14 R. 2. nu. 14.

By the statutes of 3 H. 7. and 11 H. 7. all Vsury is damned and prohibited, and there it is called Dry exchange. So as usury is not only against the law of God, & the laws of the Realm, but against the law of nature. Vsura contra naturam est, quia usura sua natura est sterilis, nec fructum habet.

3 H. 7. ca. 5, 6. 11 H. 7. ca. 8. Vide 5 E. 6. c. 20.

But now by the statutes of 37 H. 8. and 13 Eliz. all former Acts, Statutes, and Laws ordained and made, for the avoiding or punishment of Vsury, are made void, and of none effect. So as at this day, neither the Common law, nor any statute is in force, but only the statutes of 37 H. 8. 13 Eliz. and 21 Iac. And the Ecclesiasticall jurisdiction is saved by the said statute of 13 Eliz. as thereby it appeareth. For the Exposition of which statutes of 37 H. 8. and 13 El. see in my Reports, viz. Lib. 3. fo. 80, 81. Lib. 5. fo. 69, 70. Lib. 9. 26.

27 H. 8. ca. 9. 13 Eliz. ca. 8. 21 Jac. ca. 17.

CAP.

CAP. LXXI.

Of Simony and corrupt Preſentations.

Simony. Simonia eſt vox eccleſiaſtica, à Simone illo Mago deducta, qui donum Spiritus ſancti pecuniis emi putavit.

Againſt Simony, &c. the ſtatute of 31 Eliz. is made in theſe words.

Simony diſcribed by the Act following.

Stat. de 31 Eliz. cap. 6.

BE it enacted that if any perſon or perſons, bodies politique or corporate, ſhall or doe for any ſumm of mony, reward, gift, profit or benefit, directly, or indirectly, or for, or by reaſon of any promiſe, agreement, grant, bond, covenant, or other aſſurance, of or for any ſumm of mony, reward, gift, profit or benefit whatſoever, directly, or indirectly, preſent, or collate any perſon to any benefice with cure of ſoules, dignity, prebend, or living Eccleſiaſticall; or give, or beſtow the ſame for, or in reſpect of any ſuch cauſe or conſideration: * That then every ſuch preſentment, collation, gift, and beſtowing, and every admiſſion, inſtitution, inveſture, and induction thereupon ſhall bee utterly voyde, fruſtrate, and of none effect in law; and that it ſhall, and may be lawfull to and for the Queenes Majeſtie, her heires and ſucceſſors, to preſent, collate unto, or give, or beſtow every ſuch benefice, dignity, prebend and living Eccleſiaſticall for that one time, or turne onely, and that all and every perſon and perſons, bodies politique and corporate, that ſhall give or take any ſuch ſumm of mony, reward, &c. ſhall forfeit and loſe the double value of one yeares profit of every ſuch benefice, dignity, prebend and living Eccleſiaſticall. And the perſon ſo corruptly taking, procuring, ſeeking, or accepting any ſuch benefice, dignity, prebend, or living, ſhall thereupon, and from thenceforth be adjudged a diſabled perſon in law to have, or enjoy the ſame benefice, dignity, prebend, or living Eccleſiaſticall.

See the 2. part of the Inſtit. in the expoſition of the ſaid Act of 31 El. *Injuſtum eſt illa vendere quæ gratis diſtribui debent.* vide Matth. ca. 10. ver. 8.

* Nota, the ſtatute doth not make the bond, promiſe, covenant, or other aſſurance void, but the preſentment, &c. and ſo it was adjudged, Paſch. 40. Eliz. Rot. 1745. in Comuni Banco, between Gregory plaintif and Oldbury defendant. Nota differentiam inter malum in ſe againſt the common law, & malum prohibitum by ſtatute law; & malum in ſe againſt the Common law, and malum prohibitum by the Civill or Canon law; whereof the Judges of the Common law in theſe caſes take no notice.

This is the tert of this part of the Act, now let us proceed to the expoſition hereof, being a neceſſary law to be put in execution.

¶ Preſent or collate.] **This is not onely intended, where the perſon preſenting, or collating hath right to preſent, or collate; but alſo where any perſon, or perſons, bodies politique and corporate, doe uſurp, and have no title to preſent or collate. And ſo it was adjudged in caſe where the uſurpation was to a Church of the King.**

Sed quando præſentatio & jus patronatus ſunt temporalia, quæritur quomodo fit Simonia per donum pecuniæ pro illis: Reſpondendum eſt, quod jus patronatus & præſentatio dicuntur ſpiritualia, reſpectu rei, ad quam præſentatur, quæ ſpiritualis eſt. Vide Linwood cap. de Jurejurando. fo. 80.

Mic. 13 Ja. in Quare impedt. Betweene the King and the B. of Norwich. Tho. Cole and Robert Secker, which began Paſch. 13 Jac. Rot. 21. for the Vicarage of Haverell in Suffolk.

¶ Shall be utterly voide and of none effect.] **But here is to be obſerved a diverſity between a preſentation, or collation made by a rightfull patron, and an uſurper. For in caſe of a rightfull patron, which doth corruptly preſent, or collate, by the expreſſe letter of this Act the King ſhall preſent: but where one doth uſurp, and corruptly preſent or collate, there the King ſhall not preſent, but the**

the rightfull patron: for the branch that gives the King power to present, is onely intended, where the rightfull patron is in fault, but where the rightfull patron is in no fault, there the corrupt act, and wrong of the usurper maketh the benefice &c. voide, but taketh not away the lawfull title to present from the rightfull patron, and so was it adjudged in the case aboveſaid.

Mich. 13 Jac. ubi ſupra.

Alſo upon theſe words, [If any patron without the notice of the perſon ſo preſented, or collated, doth take reward, &c.] yet by the expreſſe Letter of this branch the Church &c. is voide, for both the Letter and intention of this Act is to make the admiſſion, inſtitution, and induction of any preſentee, that commeth in by a corrupt patron voide. And ſo was it reſolved in the caſe aboveſaid, as it hath been formerly adjudged in the Common place. But where the preſentee is not privy, nor conſenting to any ſuch corrupt contract, as is prohibited by this Act, becauſe it is no Simony in him, there the preſentee ſhall not be adjudged a diſabled perſon within this Act: for the words of that branch be, And the perſon ſo corruptly giving, &c. ſo as he ſhall not be diſabled, unleſſe he be privy to the corrupt contract: and upon the ſeverall penning of theſe ſeverall branches, the diverſity aboveſaid was reſolved Mich. 13 Jac. ubi ſupra.

Mich. 41 & 42 El. in Communi banco between Baker and Rogers.

¶ Shall forfeit and loſe the double value of one yeares profit.] This double value ſhall be accounted according to the very, or true value, as the ſame may be letten, and ſhall be tryed by a Jury, and not according to the ertent, or taration of the Church: whereof one was made both of the ſpiritualties and temporalties in 20 E. 1. 1292. in the time of Pope Nicholas: Of that vide 11 H. 4. fo. 35. F. N. B. 176. & Polichron. lib. 7. cap. 38. Rot. Parl. 18 E. 3. nu. 44. ſta. 2. 1 R. 2. nu. 102. 8 H. 6. nu. 15. And the other taration was made in 26 H. 8.

24 E. 3. fo. 35.
38 E. 3. 3.
7 Eliz. Dier 257.

¶ Be adjudged a diſabled perſon in law.] It was reſolved in the caſe of Mich. 13 Jac. ubi ſupra, that the King could not diſpenſe with this diſability by a non obſtante: for when an Act of Parliament is made that diſableth any perſon, or maketh any thing void, or tortious for the good of the Church, or Common-wealth, in this law all the Kings ſubjects have an intereſt, and therefore the King cannot diſpence therewith no more then with the Common law: but where a ſtatute prohibiteth any thing upon a penalty, and giveth the penalty to the King, or to the King and Informer, there the King may diſpenſe with the penalty, and this diverſity is warranted by our books.

5 E. 3 29. 11 H 4. 76. 2 H. 7. 6. 11 H. 7. 11. 13 H. 7. 8. b. 27 H. 8. F. N. B. 211. b. Placita com. 502.

* King Iames referred this caſe unto Sir Thomas Egerton Lord Chancellor of England, and to the chiefe Juſtice of the Kings bench. Sir Robert Vernon being Coferer of the Kings houſe, by reaſon of which office, he hath the receipt and payment of 40000. li. of the Kings treaſure yearely, and payeth the wages beneath the ſtayres, &c. did bargaine and ſell the ſaid office for a great ſumm of money, & for certaine annuities to be paid, to Sir Arthur Ingram Knight. The firſt queſtion was whether the ſaid office were void by force of the ſtatute of 5 E. 6. ca. 16. The ſecond was, ſeeing the words of this Act be [ſhall be adjudged a diſabled perſon in law, to all intents and purpoſes to have and occupy any ſuch office, &c.] whether the King might diſpenſe with that [diſabled] And upon mature deliberation and hearing of counſell learned, they reſolved, and ſo certified the King, that the ſaid office was void by the ſaid bargaine and ſale, and that the King could not diſpenſe with the ſaid diſability, for the reaſon and cauſe above ſaid; and thereupon Sir Marmaduke Darrell was preferred to that office.

* Anno 12 Jac. regis Sir Arthur Ingrams caſe upō the ſtatute of 5 E. 6. cap. 16.

Likewiſe by the ſtatute of 5 Eli. Every perſon which ſhall be elected a Knight, Citizen, Burges, or Baron of the Cinque ports for any Parliament, before he ſhall enter into the Parliament houſe, ſhall take the oath of Supremacy appointed by the Act of 1 Eliz. and that he that entreth into the Parliament without taking the ſaid oath, ſhall be deemed no Knight, Citizen, Burges, or Baron, nor ſhall have any voice, but ſhall be, as if he had been never returned, or elected. Here be words that amount to a diſability, and therefore that according to the former reſolutions the King cannot diſpenſe with the ſame.

5 Eliz. cap. 1.

¶ It

¶ It is further enacted, that if any perſon ſhall for any ſum of money, reward, &c. *(ut ſupra)* other then for uſuall fees, admit, inſtitute, inſtall, induct, inveſt, or place any perſon in or to any Benefice with cure of ſouls, dignity, Prebend, or other Living Eccleſiaſticall: That then every perſon ſo offending ſhall forfeit and loſe double value, *ut ſupra*; and that thereupon immediately from and after the inveſting, inſtallation, or induction thereof had, the ſame Benefice, &c. ſhall be eſtſoons meerely void, &c.

The reaſon of this clauſe (for I was of this Parliament, and obſerved the proceedings therein) was to avoid haſty & precipitate Admiſſions, Inſtitutions, &c. to the prejudice of them that had right to preſent, by putting them to a Quare Impedit, and no ſuch haſt or precipitation is uſed, but for reward, &c. as it is to be preſumed.

There be two great enemies to juſtice and right, viz. Præcipitatio, & moroſa Cunctatio.

And albeit the Church is full by the Inſtitution, &c. againſt all, but the King, yet the Church becommeth not void by this branch of this Act, untill after induction.

¶ And that the Patron, &c. ſhall and may preſent, &c.] This is intended of the rightfull Patron, or of him that hath right to preſent.

¶ And be it further enacted, that if any Incumbent of any Benefice with cure of ſoules ſhall curruptly reſigne, or exchange the ſame, or corruptly take for or in reſpect of the reſigning or exchanging of the ſame, directly or indirectly, any penſion, ſum of mony, or benefit whatſoever: That then as well the giver as the taker, &c. ſhall loſe double the value of the money ſo given, and double the value of one years profit. Vid. 14. H. 4. 19.

By another branch of this Act it is provided, That if any perſon or perſons ſhall or doe receive, or take any money, reward, &c. *Vt ſupra*, (ordinary and lawfull fees only excepted) for or to procure the ordaining or making of any Miniſter, or giving any Orders, or licence to preach, ſhall for every offence forfeit and loſe the ſumme of forty pound, and the party ſo corruptly made Miniſter, ſhall forfeit and loſe the ſum of ten pound, and if at any time within ſeven years after ſuch corrupt entring into the Miniſtry, he ſhall accept or take any Benefice, Living, or promotion Eccleſiaſticall, that then immediately, from and after the induction, inveſting, or inſtallation thereof, or thereunto had, the ſame Benefice, Living, and Promotion Eccleſiaſticall ſhall be eſtſoons meerly void, &c.

¶ Take a Benefice.] This word Beneficium Eccleſiaſticum extendeth not only to Benefices of Churches Parochiall; but to dignities and other Eccleſiaſticall promotions; as to Deaneries, Archdeaconries, Prebends, &c. And it appeareth in our * books that Deaneries, Archdeaconries, Prebends, &c. are benefices with cure of ſouls; but they are not comprehended under the name of benefices with cure of ſouls within the ſtatute of 21 H. 8. by reaſon of a ſpeciall Proviſo; which they had been, if no ſuch Proviſo had been added, viz. Deans, Archdeacons, Chancellours, Treaſurers, Chanters, Prebend, or a Parſon where there is a Vicar indowed. 33 E. 1. tit. Annuity 51. Vide Canon 40. 1 Iacobi 1603. the oath againſt Simony, &c. * 9 E. 3. 22. 10 E. 3. 1. 29 E. 3. 44. Regiſt. 58. 21 H. 8. ca. 13. verſ. finem.

¶ If any perſon or perſons, bodies politique or corporate, which have election, nomination, voice, or aſſent in the choice, election, preſentation

ſentation or nomination of any Scholar, Fellow or any other perſon to have room, or place in any Church Collegiat or Cathedrall, Colledges, Schools, Hoſpitals, Halls, or Societies, ſhall take or receive any money, fee, or reward, &c. the place, room, office, &c. of the offender ſhall be void, &c.

Like caſes in Pl. com. 176. upon the ſtatute of 32 H.8. of Cond. Dier 20 Eliz. upon the ſtatute of 27 H.8. Of Uſes.

¶ Which have election, preſentation, &c.] This Act being a law perpetuall, theſe words extend not only to ſuch perſon and perſons, &c. as at that time had election, preſentation, &c. but to all and every perſon and perſons, that at any time hereafter ſhould have election, preſentation, &c. otherwiſe the law ſhould be but temporary, which ſhould be directly againſt the meaning of the makers of the Act. And by the ſame reaſon this Act extendeth not only to Churches, Colledges, Schools, Hoſpitals, Hals, and Societies founded at the time of the making of the Act, but to all ſuch as ſhould be erected or founded after.

¶ And if any Fellow, Officer, or Scholar in any of the Churches, Colledges, &c. *ut ſupra.* contract or agree for any money, reward, &c. for the leaving, or reſigning up of the ſame his room or place to any other, &c. ſhall forfeit & loſe double the ſum of money, &c. ſo received, and every perſon by whom or for whom any money, &c. ſhall be given, &c. ſhall be incapable of that place or room for that time or turn, &c. And it is further enacted, that at the time of every ſuch election, preſtion or nomination, as well this preſent Act, as the orders, and ſtatutes of the ſame places concerning ſuch election, preſentation or nomination ſhall then and there be publiquely read, upon pain to forfeit and loſe the ſum of forty pound, &c. whereof, the one moity to him that will ſue, and the other moity to the Church, Colledge, &c.

I have read ancient Verſes concerning Simony, and other corrupt entrie into Churches, which are not unnecellary, in deteſtation of them, to remember.

Quatuor Eccleſias portis intratur in omnes,
Cæſaris & Simonis, Sanguinis, atque Dei.
Prima patet magnis, nummo patet altera, charis
Tertia, ſed paucis quarta patere ſolet.

Four doors hath every Church, and all but one forebod,
(Whereof unſeen ſome may be peradventure)
Of Ceſar, Simonie, of Kindred, and of God:
And each Church-man by one of theſe doth enter.
Great mens command doth open wide the firſt,
At next by money enter many one,
The third to weak Allies, but (for the Church the worſt,)
Gods dore doth open to a few or none.

7 E.3.39.a. 27 E.3.89. 29 E.3. Preſent. al egliſe. Fitz. 17. 8 E.2. preſent. 10. Fitz. N.B. 33. S. 24 E.3.29.

To conclude this chapter with this, that Simony is odious in the eye of the Common law: for a Garden in ſocage of a manno, whereunto an Advowſon is appendant, ſhall not preſent to the Church, becauſe he can take nothing for the preſentation, for the which he may account to the heir; & therefore the heir in that caſe ſhall preſent of what age ſoever. And if an heir of tenant in capite, hath livery cum exitubus, yet ſhall the heir not preſent to an Advowſon, becauſe no iſſues or profit can be taken thereof.

* *Jerome.* * Latro eſt qui aurum ex religione ſectatur.

3 H.6. tit. damages. 17 adjudge. See the 2. pt of the Inſtit. W.2. ca.5. Lib.6. fo.50. & 51. Lib.5.58, 59. Speccot.

And the Common law would have the Patron ſo far from Simony, as it denied him to recover damages in a Quare Impedit, or Aſſiſe of Darrein Preſentment, before the ſtatute of W.2. cap.5.

a Vide Linwood ubi ſupra.

a Simony is the more odious, becauſe it is ever accompanied with Perjury, for the preſentee, &c. is ſworn to commit no Simony.

CAP.

CAP. LXXII.

Of Monomachia, Single combate, Duell, Affrays, and Challenges, and of Private revenge.

THis single combat between any of the Kings subjects, of their own heads, and for private malice, or displeasure is prohibited by the laws of this Realm: for in a setled State governed by law, no man for any injury whatsoever, ought to use private revenge; for revenge belongeth to the Magistrate, who is Gods Lieutenant. And the law herein is grounded upon the law of God. Vindicta est mihi, & ego retribuam, dicit Dominus. Vengeance is mine, and I will repay it, saith the Lord. Qui vindicari vult, inveniet vindictam à domino, & peccata illius servans servabit. He that will revenge, shall finde vengeance from the Lord, and he will surely keep his sins in remembrance. Deut. 32. 35. Rom. 12. 19. Ecclesiasticus 28. 1. Gen. 34. ver. 25. & 30. of Simeon and Levi.

It is also against the law of nature and of nations, for a man to be Judge in his own proper cause, Judex in propria causa; especially in Duello, where fury, wrath, malice and revenge are the rulers of the judgment. See more of private revenge, cap. Misprision, in [Crimen commissionis.]

But it is objected, that this single combat may be undertaken for revenge, and preservation of the honour of the party greved. *Object.*

1. The honour or estimation of the party may more justly and notoriously be revenged, and repaired by the Magistrate in publique, then by the party in private. 2. There is nothing honourable, that is against the laws of his Country, and the law of nature and nations. 3. Whatsoever is against the law of God is impious and dishonourable. 4. The eminent danger of the parties seeking private revenge. first, concering the soules of both of them, as well of him that killeth (who is vir sanguinis) as of him that is slain, and dieth in his malice: and as to the world, he that slayeth is in worse case, then he that is slain. For the murderer loseth not only his lands and goods, but his life also and his honour, which he so much respected: for by his attainder his bloud shall be corrupted, and if he were noble, or gentle before, he thereby becomes ignoble and base, and he that is slain by law loseth none of them: so as hereof it is truly said, Infælix pugna, ubi majus periculũ incumbit victori, quàm victo. 5. Not only the soul of man, but the body also, was originally made to the Image of God, Quicunque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei factus est homo. Who so sheddeth mans bloud, by man shall his bloud be shed, for in the image of God made he man. Solus Deus, qui vitam dat, vitæ est Dominus; nec potest quisquam eam juste auferre nisi Deus, vel gerens authoritatem Dei, ut Judex. And this was the reason, that amongst Christians it was not lawfull for the Lord to kill his Villain. *Resp.* Gen. 9. 6.

In ancient time so much the law did respect honour, & order, as hear what Britton saith. Si trespas soit fait en temps de peace a Chivaliers, ou a auters gents honorables per Ribaudes ou auters viles persons, si le ferue soit per felony, &c. sauns desert del Chivalier, que le Ribaude perdra son poigne dount il trespassa. Brit. c. 25. f. 49. b.

And many Ordinances, Laws, and Acts of Parliament, which doe prohibit the pardon of wilfull murder, are also grounded upon the law of God, to the end none should offend in hope of pardon. * Non accipies precium ab eo qui reus est sanguinis, statim enim & ipse morietur. Ne polluatis terram habitationis vestræ, quæ cruore maculatur; nec aliter expiari potest, nisi per ejus sanguinem, Glouc. 6 E. 1. c. 9. 2 E. 3. ca. 2. 4 E. 3. ca. 13. 14 E. 3. cap. 15. 13 R. 2. St. 2. c. 1. Read these star. * Num. 35. 31. 33.

See before in the chapter of Murder.

nem, qui alterius ſanguinem effuderit. Ye ſhall take no ſatisfaction for the life of a murtherer, which is guilty of death, but he ſhall be ſurely put to death: ſo ye ſhall not pollute the land wherein you are, for bloud defileth the land, and the land cannot be cleanſed of the bloud that is ſhed therein, but by the bloud of him, that ſhed it.

Mat. 26. 52. Apocal. 13. 10.

And this law is confirmed by Chriſt himſelf in the Goſpel, and by the laſt book of holy Scripture. Omnes qui acceperint gladium gladio peribunt. Qui in gladio occiderit, oportet eum gladio occidi.

Affray. Trin. 10 E. 3. Coram Rege, Rot. 87. Northt.

But albeit upon the ſingle combate no death enſue, nor blood drawn, yet the very combate for revenge is an Affray, and a great breach of the Kings peace, an affright and terrour to the Kings ſubjects, and is to be puniſhed by fine and impriſonment, and to find ſureties for their good behaviour; for it is Vi & armis, & contra pacem domini regis, &c. and in reſpect of incrochment upon royall Authority for revenge, it is contra coronam & dignitatem.

4 H. 6. fo. 10. 8 E. 4. fo. 5.

An Affray is a publique offence to the terrour of the Kings ſubjects. and is an engliſh word, and ſo called, becauſe it affrighteth and maketh men affraid, and is enquirable in a Leet as a common Nuſans. See the ſtatute of 2 E. 3. c. 3. where it is (en effraier de la pais,) & the Writ grounded upon that ſtatute ſaith, In quorundam de populo terrorem, as it appeareth in F. N. B. fo. 249. f. and the regiſter agreeth with the originall, and therefore the printed book (en affray de la peace) muſt be amended.

Regula.

And if any ſubject by word, writing, or meſſage challenge another to fight with him, this is alſo an offence before any combate be performed, and puniſhable by law, & it is contra pacē, coronā, & dignitatem. For Quando aliquid prohibetur, prohibetur & omne, per quod devenitur ad illud. Or ſuch offenders may be puniſhed in the Star-chamber, whereof there be many Preſidents. Now when an affray is made by ſingle combat, any ſtander by, that is no officer, may endeavour to part them, and prevent further danger, and the law doth incourage them hereunto; for if they receive any harm by the Affrayours, they ſhall have their remedy by law againſt them, and if the Affrayours receive hurt by the endeavouring only to part them, the ſtanders by may juſtifie the ſame, and the affrayours have no remedy by law. But if either of the parties be ſlain, or wounded, or ſo ſtricken, as he falleth down for dead, in that caſe the ſtanders by ought to apprehend the party ſo ſlaying, wounding, or ſtriking, or to endeavour the ſame by hue and cry, or elſe for his eſcape they ſhall be fined and impriſoned. But if the Sherif, Juſtice of Peace, Conſtable, or other conſervatour of the peace doe not part the Affrayours for the preſervation of the Kings peace, and apprehend them being within his view, or doe not his uttermoſt endeavour to part and apprehend them, they may be fined and impriſoned for their neglect thereof, for they may command others to aſſiſt them, and therefore the rule holdeth in them, Idem eſt facere, & nolle prohibere cum poſſis: & qui non prohibet, cum prohibere poſſit, in culpa eſt. And if any be commanded to aſſiſt them therein, and refuſe or neglect the ſame, it is a contempt in them to be puniſhed by fine and impriſonment.

8 E. 2. Cor. 295. 22 Aſſ. pl. 56.

3 H. 7. 10. b. Beding fields caſe.

Fleta li. 1. c. 32. §. Duellum. 2. pt of the Inſtit. W. 1. c. 40. Fleta ubi ſupra.

There is a duellum allowed by law depending a ſuit for the triall of truth, whereof we have ſpoken in another place, and as here it appeareth, there is a duellum againſt law: of both theſe an ancient Authour ſaith thus, and firſt of the lawfull: Duellum eſt ſingularis pugna inter duos ad probandum veritatem litis, & qui vicerit probaſſe intelligitur, & quamvis judicium Dei expectetur ibidem, quicunque tamen Monomachiam, i. e. ſingularem pugnam ſponte ſuſceperit vel optulerit, homicida eſt, & contrahit mortale peccatum. Et eodem modo judex qui authoritate defert, vel præſtat, omneſque acceſſores, & conſulentes, faventes & auxiliantes, nec non & ſacerdos qui dat benedictionem.

11 H. 3. Tit. droit Fitz. 57.

In a Writ of right, if the tenant wage battail by his Champion, and if the Champion after become blind by infirmity, and not ex fultitia, he ſhall be diſcharged of the battail. And if a man be appealed of felony, and gage battaile, and after become blind, ut ſupra, he ſhall be diſcharged of the battail, becauſe he becommeth

becommeth so by the Act of God. And if the Appellant after battail waged become blinde upon any occasion, the Appellee in favorem vitæ shall goe quit. When issue is joyned to be tried by battail, and the triall by battail is become impossible by the Act of God, or by the default of the Appellant, the Appellee goeth free.

And this kind of battail, in case of Appeals and Writ of right, is by publique authority and course of law, whereunto all the people by an implied consent are parties; and (as some hold) hath his warrant by the word of God by the single battail between David and Goliah, which was stricken by publique authority. 1 Regum c. 17. ver. 45, &c.

King E. 3. in the Sirteenth year of his reign, having war with the French King for his right to the Kingdome of France, out of the greatnesse of his minde, for love of his subjects, the saving of Christian bloud, and a speedy tryall of the right, offered the single combate with the French King, but he refused it.

Afterwards also, after long and chargeable wars between the Crowns of England and France, for the right of the Kingdome of France, it was an honourable offer which King R. 2. made to Charles the French King for saving of Christians guiltlesse bloud, and to put an end to that bloudy and lingring war, which we will rehearse in the very words of the Record it self.

[a] Rex dedit potem Johanni Duci Lancast' Avunculo suo de certis requestis seu oblationibus Carolo Regi Franc' faciend', viz. quod negotium bellicum inter prædictos reges finiatur. 1. Per certamen personarum suarum. 2. Vel aliter inter personas suas cum tribus Patruis ipsorum ipsis utrinque adjunctis. 3. Aut alioquin quod dies congruus assignaretur & locus, quibus sub universali certamine potentiarum suarum finis bello imponi valeat. The Duke of Lanc' according to his Commission made these offers from the King of England to King Charles of France, but he was auditus, sed non exauditus; for King Charles liked none of these offers.

[a] Rot. Franciæ 7 R. 2. m. 24. The offer of R. 2. to King Charles of France.
1. A single combat between the two Kings.
2. Or a combat between the two Kings and three of their Uncles on either side.
3. Or that a fit day and place might be assigned when under the universall conflict of both their armies, an end might be put to the war.

[b] And in Anno Domini 1196. Anno Regni Ricardi primi Octavo, Philip King of France sent this challenge to Richard the first, that King R. would choose five for his part, and he the King of France would appoint five for his part, which might fight in lists for triall of all matters in controversie between them for the avoiding of shedding of more guiltlesse bond. King Richard accepted the offer, with condition that either King might be of the number, but this condition would not be granted.

[b] N. Trivet.

[c] These, and the like offers, as they proceeded from high courage and greatnes of mind, so had they been lawfull, if they had been warranted by publique authority.

[c] See the 2. part of the Institutes W. 1. ca. 20.

CAP. LXXIII.

Againſt going or riding armed.

Item. IT is enacted, that no man, great or ſmall, of what condition ſoever he be, (except the Kings ſervants in his preſence, and his miniſters in executing *des mandements le Roy*, or of their Office, & ſuch as be in their company aſſiſting them, and alſo upon a Cry made for armes to keep the peace, and the ſame in ſuch places where ſuch things happen) be ſo hardy to come before the Kings Juſtices, or other the Kings Miniſters doing their office, with force and armes, nor bring force in affray of the people, nor to goe nor ride armed by night nor by day, &c. before the Kings Juſtices, or in any place whatſoever, upon paine to forfeit their armor to the King, & their bodies to priſon at the Kings pleaſure, and to make fine, and ranſome to the King, &c.

2 E 3. cap. 3. Paſch. 18. E. 3. coram rege. Rot. 146. Midd. 8. R. 2. cap. 13. the printed book is 7. but it ought to be 8. and ſo recited in 20. R. 2. ca. 1. Lib. 5. fo. 72. St-Johns caſe.

20 R. cap. 1.

Upon this ſtatute two things fall into conſideration. Firſt, what the Common law was before the making of this ſtatute. Secondly, the true ſenſe, and expoſition of this Act. For it appeareth by a Record in 29 E. 1. quòd non liceat torneare, bordeare, juſtas facere, aventuras guerare, ſeu ad arma præſumere, ſine licentia regis. See Britton fo. 29. b. It was called turneamentum decurſus, of turning and winding, in reſpect of the agility, as well of the horſe, as of the man. For in thoſe daies this deed of Chivalry was at randon, whereupon great perill enſued. Therefore in the reigne of E. 3. for ſafety the Tilt was deviſed. See the ſtatute of 7 E. 2. De defenſione portandi arma, and the ſtatute of W. 1. cap. 9. & cap. 17. W. 2. cap. 39. and the expoſitions upon the ſame.

Paſch. 29 E. 1. coram rege. Rot. 101. Eſſex. Paſch. 18 E. 1. coram Rege. Rot. 32. Glouc.

It is Lex & cõſuetudo Parliamenti, that whereſoever the Parliament is holden, proclamation ſhould be made forbidding wearing of armor, and exerciſe of playes and games of men, women, or children, in or about the City, or place where the Parliament is holden, leſt the proceedings in the high court of Parliament pro bono publico, ſhould thereby be hindred or diſturbed.

Ver. mag. cart. 2. part. fo. 40. b. Rot. Parl. 6 E. 3. nu 2. & 3. 13 E. 3. nu. 2. 14 E. 3. nu. 2. 15 E. 3. nu. 2. 17 E. 3. nu. 2. 18 E. 3. nu. 2. 25 E. 3. nu. 50. Parl. 1. & 25 E. 3. Parl. 2. nu. 5.

[a] If any by mutuall aſſent, do uſe Juſts or Turneaments, or to play at ſword and buckler, or any other deeds of armes, and the one killeth the other, this is felony, for that it is not lawfull to uſe them without the Kings licence; which agreeth with the record aboveſaid, of 29 E. 1.

[a] 11 H. 7. fo. 23. vide before cap. *Homicide.* Brook Coron. 229. See 24 H. 8. cap. 13. Juſts. Turnies, Bariers, &c.

[b] Willus Jordan inventus fuit vagans armatus de platis, attachiatus, &c. compertum eſt per Juratores, quòd minatus fuit per quoſdam ignotos, & quòd pro ſalvatione vitæ ſuæ, platas prædictas appoſuit ſuper corpus ſuum, tamen invenit ſecuritatem pro bono geſtu ſuo.

[b] Paſch. 18 E. 3. coram rege. Rot. 146. Nota bene.

[c] The clauſe of the ſtatute of 25 E. 3. concerning this matter, we have reſerved to this place. viz.

[c] 25 E. 3. cap. 2.

[d] And if per caſe any man of this realm ride armed covertly or ſecretly, with men of arms, againſt any other to ſlay him, or rob him, or to take & keepe him, till he hath made fine or ranſome, it ſhall not be adjudged treaſon, but it ſhall be judged felony or treſpaſſe, according to the lawes of the realme of old time uſed, and according, as the caſe requires. And if in ſuch caſe, or other like, before this time any Juſtices have judged treaſon, and for this cauſe the lands and tenements have come into the Kings hands as forfeit, the chiefe Lords of the fee ſhall have the eſcheats of the tenements holden of them, whether that the ſame tenements be in the Kings hands, or in others, by gift, or in other manner. Saving

[d] See before cap. *High treaſon.* verb. *Ouſt home levy guerre.* fo. 9.

ving alwayes to our Lord the King, the yeare, and the waſt, and the forfeitures of chattels, which pertain to him in the caſes above-named. And that writs of *Scire facias* be granted in ſuch caſe againſt the land tenants without other originall, and without allowing any protection in the ſaid ſuit. And that of the lands which be in the Kings hands, writs be granted to the Sherifs of the Counties, where the lands be, to deliver them out of the Kings hands without delay.

Concerning the point of felony, it muſt be obſerved, that at the making of that ſtatute, and by the lawes of the Realme of old time uſed in ſuch caſe, when any purpoſed to ſlay, and declare it by ſuch overt act, voluntas reputabatur pro facto, as hath been ſaid before; and ſo is this branch concerning that point to be underſtood. Vide cap. High treaſon, verb. *Fait compaſſer* fo. 6.

¶ And that writs of Scire fac. be granted.] Here it may appeare what ſpeedy remedy by Scire fac. the makers of this law gave for reſtitution to be made, where any of the Juſtices had in any of the caſes mentioned in this branch judged it treaſon, which is declared by this law to be againſt law. Scire fac. Note for reſtitution. See hereafter cap. Reſtitution.

Now let us peruſe the words of the ſaid Act of 2 E. 3.

¶ His miniſters in executing.] By the order of the Common law and ſtatutes of the Realme, the ſherif, or other miniſter of the King in execution of the Kings writs, or proces of law, might after reſiſtance take poſſe comitatus. For, Sequi debet potentia legem, & not antecedere. W. 1. ca. 9. & 17. W. 2. cap. 39. 18 E. 2. Execution. 251. 19 E. 2. ibid. 247. 3 H. 7. fo. 1. et 10. b. 14 H. 7. 8. Lib. 5. fo. 91. Semaynes caſe.

¶ Des mandements le Roy.] That is, of the Kings writs, and proces of law, ſecundum legem & conſuetudinem Angliæ. Though in this Act there be three ſpeciall exceptions, yet the law doth make another exception, and that is, to aſſemble force to defend his houſe, as hereafter ſhall be ſaid

¶ To come before the Kings Juſtices, or other the Kings miniſters doing their office, with force and armes.] Bracton doth notably write of the diverſity of forces; viz. that there is Vis expulſiva, perturbativa, inquietiva, ablativa, compulſiva, &c. which you may read in him. And then (which is pertinent to our purpoſe) he ſaith: Eſt etiam vis armata, (armis dejectum dico qualitercunque fuerit vis armata) non ſolum ſi quis venerit cum telis, verum etiam omnes illos dicimus armatos, qui habent cum quo nocere poſſunt. Telorum autem appellatione omnia, in quibus ſinguli homines nocere poſſunt, accipiuntur: ſed ſi quis venerit ſine armis, & ipſa concertatione ligna ſumpſerit, fuſtes, & lapides, talis dicetur vis armata; Si quis autem venerit cum armis, armis tamen ad dejiciendum non uſus fuerit, & dejecerit, vis armata dicitur eſſe facta; ſufficit enim terror armorum, ut videatur armis dejeciſſe. Agreeing with that of the Poet, Bracton lib. 4. fo. 162.

Jamque faces & ſaxa volant, furor arma miniſtrat. Virgil.

Britton ſaith, Nous volons, que touts gents pluis uſent judgement, que force. Britton 116. a.

¶ Nor to bring force in affray of the (paiis, i.) country.] This Act is notably expounded by the writ in the Regiſter, and F. N. B. for by that writ it appeareth, that if any doth enter into, or detaine with force any houſes, lands, or tenements, the party grieved may have a writ upon this ſtatute, directed to the ſherif, by force of which writ, if the ſherif find the force, then if any after proclamation made, (which proclamation is by reaſonable conſtruction to be made for avoiding of bloodſhed) ſhall diſobey, or if it be found by inquiſition, the ſherif is to ſeize their armes and weapons, and to arreſt and take the offenders and commit them to priſon, &c. But note the ſherif cannot reſtore the party grieved upon this writ to his poſſeſſion, [a] no more then he can upon the writ de vi laica removenda, but reſtitution muſt be made by force of the ſtatutes of 8 H. 6. and 21 Jac. And yet in ſome caſe a man may not onely uſe force and armes, but aſſem- See the chapter next before, verb. *Affraye*. Regiſtrum. F. N. B. 249. f. Nota. Vide lib. 5. fo. 9. Semayes caſe. F. N. B. 54. *a* 8 H. 6. cap. 9. 21 Jac. cap. 25. *b* 3 E. 3. cor. 303. 305. 26 aſſ. p. 22. 21 H. 7. 39.

aſſemble company alſo. As any may aſſemble his friends and neighbours, to keep his houſe againſt thoſe that come to rob, or kill him, or to offer him violence in it, and is by conſtruction excepted out of this Act: and the Sherif, &c. ought not to deal with him upon this Act; for a mans houſe is his caſtle, & domus ſua cuique eſt tutiſſimum refugium; for where ſhall a man be ſafe, if it be not in his houſe? And in this ſenſe it is truly ſaid,

21 H. 7. 39. Lib. 5. fo. 91. b. Semaynes caſe.

Armaque in armatos ſumere jura ſinunt.

But he cannot aſſemble force, though he be extreamly threatned, to goe with him to Church, or market, or any other place, but that is prohibited by this Act.

¶ Nor to goe armed, by night or by day, &c. before the Kings Juſtices in any place whatſoever.] Sir Thomas Figett Knight went armed under his garments, as well in the Palace, as before the Juſtices of the Kings Bench: for both which upon complaint made, he was arreſted by Sir William Shardiſhill Chiefe Juſtice of the Kings Bench, and being charged therewith, he ſaid that there had been debate between him and Sir Iohn Trever Knight in the ſame weeke, at Pauls in London, who menaced him, &c. and therefore for doubt of danger, and ſafegard of his life, he went ſo armed. Notwithſtanding the Court upon their view awarded, that the armes were forfeited, and thereupon the ſame were ſeiſed, and he commanded to ward in the Marſhalſea during the Kings pleaſure. Sir Thomas prayed to find mainprize, which was denied, untill the pleaſure of the King was known, becauſe he was impriſoned during the Kings pleaſure, according to this ſtatute.

24 E. 3. fo. 33.

¶ Vpon paine to forfeit their armor, &c.] It appeareth before by the caſe of Sir Thomas Figett, that the offender was to bee puniſhed according to this Act; but by forfeiture of the armor and impriſonment; but the ſtatute of 20 R. 2. cap. 1. doth add fine, and impriſonment.

24 E. 3. ubi ſupra. Vide the 4. part of the Inſtitutes. cap. *Lect.* 20 R. 2. cap. 1. Vid. indorſſ. clauſ. 2 E. 2. 19. 22.

¶ And that the Kings Juſtices, in their preſence, &c.] So did Sir William Shardiſhill, as is aboveſaid.

¶ And other miniſters in their bailiwickes, &c.] That is to ſay, Sherifs, Bailifs of liberties, &c.

¶ Lords of franchiſes] And their bailifs, Maiors, and Bailifs of Cities, and Borowes within the ſame Cities and Borowes, and Borowholders, Conſtables, & Wardens of the peace within their wards ſhall have power to execute this Act. And the Juſtices aſſigned at their comming down ſhall inquire how ſuch officers, and Lords have exerciſed their offices in this caſe, and to puniſh them whom they find, that have not done that which pertained to their office. See 12 R. 2. cap. 6.

It is to be obſerved, that upon this ſtatute by the reſolution of the Judges a writ was framed, and inſerted into the Regiſter, when any with force & armes enter any lands and tenements, or detaine the ſame with force and armes, directed to the Sherif, reciting the force, and our Act, (and ſaith) Nos ſtatutum prædictũ inviolabiliter obſervari, et idẽ infringentes iuxta vim, et effectũ ejuſdẽ ſtatuti caſtigare facere volentes & punire, Tibi præcipimus, &c. publice proclamari facias, &c. as in the writ. And here is a ſecret in law, that upon any ſtatute made for the common peace, or good of the Realm, a writ may be deviſed for the better execution of the ſame, according to the force and effect of the Act.

Regiſtrum. F. N. B. 249. f. 24 E. 3. fo. 33.

Vide 36 E. 3. ca. 9. Simile.

Note, Proclamations are of great force, which are grounded upon the laws of the Realme.

CAP.

CAP. LXXIV.

Of Perjury and ſubornation of Perjury, and incidently of Oaths.

EVery perſon which ſhall unlawfully and corruptly procure any witneſſe to commit any wilfull, and corrupt perjury in any matter or cauſe depending in ſuit, and variance, by any writ, action, bill, complaint, or information in any of the Kings Courts of Chancery, Star-chamber, or in any of the Queens Majeſties Courts of Record, or in any Leet, view of Frankpledge, ancient demeſne Court, Hundred Court, Court Baron, or of the Stannary, or elſewhere within any of the Kings Dominions of England or Wales, or the Marches of the ſame: or ſhall unlawfully, and corruptly procure & ſuborn any witneſſe to teſtify *In perpetuam rei memoriam*. That then every ſuch offender ſhall forfeit the ſumme of forty pound, &c. And if any perſon either by ſubornation, or by their own act, conſent or agreement, wilfully & corruptly commit any manner of wilfull perjury by their depoſition in any of the Courts above-mentioned, or being examined *ad perpetuam rei memoriam*; Then every perſon ſo offending ſhall loſe and forfeit twenty pound, and to have impriſonment by the ſpace of ſix moneths without bail or mainpriſe, &c. the one moity of all which forfeitures to be to the Queen, and the other moity to ſuch perſon or perſons as ſhall be grieved, &c. 5 El. ca. 9.

Albeit by the Common law tryall of matters of fact are by the verdict of twelve men, &c. and depoſition of witneſſes is but evidence to them: yet, for that moſt commonly Juries are led by depoſition of witneſſes, perjury of witneſſes was ſeverely puniſhed by the ancient laws of this Realm; perjury it ſelf being forbidden by the law of God, [a] Non perjurabis in nomine meo; nec pollues nomen Dei tui. And again, Non perjurabis, reddes domino juramenta tua.

A falſe witneſſe is called Perjurus, quia perpetram jurat. [b] Perjury before the Conqueſt was puniſhed ſometime by death, ſometime by baniſhment, and ſometime by corporall puniſhment, &c.

[c] Aſcuns ſont panies per cowper de langues, come ſoiloit eſtre de faux teſtmoignes. But too ſevere laws are never duly executed. Afterwards it came to be more milde, for [d] Fleta ſaith, Atrox injuria eſt quæ omnium mobilium amiſſionem confert, &c. de perjurio convictis.

Afterwards it came to fine and ranſome, and never to bear teſtimony.

Et queux ſe voillont perjurer pur lower, ou pur aſcun doute de aſcun, et ceux ſont reints a noſtre volunt, & mes ne ſoient crus per nul ſerement. And it appeareth in 7 H. 6. that he that is perjured ſhall be fined and impriſoned.

Thomas Vigrus, & duo alii ſunt culpabiles, &c. perjurati pro fractione corbellorum Iohannæ de Huntingfield in ſeperali piſcaria ſua in aqua de Hadfeld.

Qui teſtes de perjurio convincere ſatagit, multo illis plures, producere neceſſe habet.

The puniſhment of Perjury in Jurours for a falſe verdict was ſo ſevere by the Common law, as few or no Juries were upon juſt cauſe convicted, for the

[a] Exod 20.13. Levit.19.11. Mat.5.34.
[b] Leges Edw.c.3. Ethelſt. c.10.25. Edm.c.6. Canuti ca 6.& 35.&c. Edw.& Gru.c. 11.
[c] Mir. ca.4. § de paines. Int.Leg.Canuti c.15. Conviciatori Lingua excidit or.
[d] Fleta li.2.ca.1. § Ité Atrox, &c.

Britton fo.38. 237,238.

7 H.6.fo.25. Hil.8 E.1. in Communi banco Rot.38.Eſſex. Forteſcue ca.32.

Vide 1. pt of the Inſtitutes Verb.Attaint.

Sect. 514. Glanvill lib.2.ca.19. 6 H.3.Attaint.72. Bract.li.4.fo.292 b. Fleta lib.5.cap. 21. Britton fo.245. 8 E.2. Judgement.196. 16 E.3.Ibidem 109. Mich.3.H.5.Coram Rege Rot.14 & 49. Forteſcue ca.29.

judgement

judgement against them was, 1. Quod amodo amittant liberam legem imperpetuum. 2. Non trahantur in testimonium veritatis. 3. Bona & catalla sua forisfaciant regi. 4. Terræ & tenementa sua capiantur in manus regis. 5. Quod uxores & liberi sui amodo amoveantur. 6. Quod terræ & tenementa sua extirpentur, &c. 7. Quod capiantur, & in Gaolam detrudantur. Which sheweth how odious perjury was in the eye of the law: and this law doth yet remain in force; but a milder punishment is set down by the statute of 23 H.8. wherein the party grieved hath election to ground his writ of Attaint upon this statute, or to take his remedy at the Common law.

23 H.8.c.2.3.

For perjury concerning any temporall act, the Ecclesiasticall Court hath no jurisdiction; and if it be concerning a spirituall matter, the party grieved may sue for the same in the Star-chamber. See the statutes of 3 H.7.ca.1. 11 H.7. ca.25. 32 H.8.ca.9. And when you have read the case in Mich. 7 & 8 Eliz. Dier 242,243. you will confesse how necessary the reading of ancient Authors and Records is, and the continuall experience in the Star-chamber is against the opinion conceived there.

2 H.4.10.
11 H.4.88.
20 E.4.10.b.
22 E.4.
13 El. Dier 302.
Mich. 7 & 8 El. Dier 242,243.

And Mich. 10 Iac. in the Star-chamber in the case of Rowland Ap Eliza, it was resolved, that perjury in a witnes was punishable by the Common law, as hereafter shall be shewed more at large. But now let us peruse the words of the statute.

Mich.10 Ja. Rowl. Ap Elizaes case. in cam. Stellat. See hereafter Verb. Informatiõ 12: R. 101. 102.

¶ By any writ, action, bill, complaint, or Information.] Out of these words are perjury, and subornation of perjury upon an indictment for the King (for example of Riot) as it was resolved in Flowers case, because that perjury upon an indictment is not within the statute. But seeing perjury was an offence punishable by the Common law, though the indictment of Flower grounded upon this statute was overthrown, yet is such perjury upon an indictment punishable, and most commonly punished in the Star-chamber.

Mich.40 & 41 El. Lib.5.fo.99. in Flowers case.

¶ Information.] By this it appeareth, that perjury committed in an Information exhibited by the Kings Attorny, or any other for the King, by any witnes produced on the behalf of the King, is punishable either by this Act or by the Common law. And so it was resolved in the said case of Rowl. Ap Eliza, which was this. The Kings Attorny preferred an Information in the Exchequer against Hugh Nanny Esquire the father, & Hugh Nanny the son, & others for intrusion and cutting down a great number of trees, &c. in Penrose in the County of Cornwall. The Defendant pleaded not guilty, & the tryall being at the bar, Rowl. Ap Eliza was a witnesse produced for the King, who deposed upon his oath to the Jury, that Hugh the father and Hugh the sonne joyned in sale of the said trees, and commanded the Vendees to cut them down: upon which testimony the Jury found for the King, and assessed great damages, and thereupon judgement and execution was had. Hugh Nanny the father exhibited his bill in the Star-chamber at the Common law, and charged Rowland Ap Eliza with perjury, and assigned the perjury, in that he the said Hugh the father never joyned in sale, nor commanded the Vendees to cut down the trees, &c. And it was resolved, First, that perjury in a witnesse was punishable by the Common law. Secondly, that perjury, in a witnesse for the King was punishable by the Common law, either upon an indictment, or in an information, or by this Act in an information. And the said Rowland Ap Eliza was by the sentence of the Court convicted of wilfull and corrupt perjury.

The case of Rowland Ap Eliza in the Star-chamber ubi supra. 12: R. 101. 102.

But for our more orderly proceeding, let us define, or describe what Perjury is in legall understanding, both upon this statute, and at the Common law.

Perjury described.

Perjury is a crime committed, when a lawfull oath is ministred by any that hath authority, to any person, in any judiciall proceeding, who sweareth absolutely, and falsly in a matter materiall to the issue, or cause in question, by their own act, or by the subornation of others. Now let us peruse the branches of this description.

¶ A

[A lawfull Oath.] This word Oath is derived of the Saxon word Eoth; and is expressed by three severall names, viz. 1. Sacramentum, à sacra, & mente, because it ought to be performed with a sacred and religious mind. Quia jurare, est Deum in testem vocare, & est actus divini cultus. 2. Juramentum à Jure, which signifieth law and right, because both are required and meant, or because it must be done with a just and rightfull mind. 3. Iusjurandum, compounded of two words, à jure, & jurando. In the Common law Sacramentum is most commonly used: in our books and ancient statutes published in French, Serement, of the French word Serment, is used.

Serment or sarment. 1. Sacrement. 1. Sacramentum. Fleta li. 5. ca. 2. Brit. c. 97. fo. 237. 8. b. 19. 74. 134. 165. 236. b. Fleta li. 5. ca. 21.

An oath is an affirmation or deniall by any Christian of any thing lawfull and honest, before one or more, that have authority to give the same for advancement of truth and right, calling Almighty God to witnesse, that his testimony is true. And it is twofold, either assertorium ut de præterito, sicut testes, &c. seu promissorium de futuro, sicut Judices, Iusticiarii, Officiarii, &c. So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministred to any, unlesse the same be allowed by the Common law, or by some Act of Parliament; neither can any oath allowed by the Common law or by Act of Parliament be altered, but by Act of Parliament. It is called a corporall oath, because he toucheth with his hand some part of the holy Scripture.

So resolved An. 26 El. in the case of the Undersherif.

The oath of the Kings Privy Councell, the Iustices, the Sherif, &c. was thought fit to be altered and inlarged, but that was done by Authority of Parliament. For further proof whereof, and of the matters abovesaid, see the statutes here quoted, and it shall evidently appear, that no old oath can be altered, or new oath raised without an Act of Parliament; or any oath ministred by any that have not allowance by the Common law, or by an Act of Parliament.

Magna Cart. c. 6. Stanf. Pr. 17. F.N.B. 264. W. 1. 3 E. 1. c. 40. 18 E. 3. ubi sup.

5 R. 2. cap. 12. 6 R. 2. ca. 12. 4 H. 4. ca. 18. 2 H. 5. ca. 7. 8 E. 4. cap. 2. 1 R. 3. cap 6. & 15. 19 H. 7. ca. 14. 14 H. 8. ca. 2 23 H. 8. cap. 5. 32 H. 8. ca. 46. 2 E. 6. ca. 13. 27 El. cap. 12. See 3 Jac. c. 4.

And to conclude this point, It was resolved in Parliament holden in Anno 43 Eliz. that the Commissioners concerning Policies of assurances could not examine upon oath, because they had no warrant either by the Common law, or by any Act of Parliament: and therefore it was enacted at that Parliament, that it should be lawfull for the said Commissioners to examine upon oath any witnesse, &c. At this Parliament I attended, being then Attorny generall. And oaths that have no warrant by law, are rather nova tormenta, quam sacramenta, and it is an high contempt to minister an oath without warrant of law, to be punished by fine and imprisonment. And therefore Commissioners (that set by force of any Commission that is not allowed by the Common law, nor warranted by authority of Parliament) that minister any oath whatsoever, are guilty of an high contempt, and for the same are to be fined and imprisoned: * For Commissions are legall, and are like the Kings Writs, and none are lawfull but such as are allowed by the Common law, or warranted by some Act of Parliament: and therefore Commissions of new Inquiries, or of novell invention, are against law, and ought not to be put in execution.

43 Eliz. ca. 12.

* Commissions. Regist. 1, 2, 3. 125, 126. 88. 128. 138. 161. F.N.B. 110, 111. 2 E. 3. 26. Pasch. 44 E. 3.

Coram Rege. Rot. 2. 24 E. 3. Com. Br. 3. 29 E. 3. 30, 31. 18 E. 3. ca. 1 & 4. 18 E. 3. Stat. 2. ca. 6. Rot. Parl. 18 E. 3. nu. 47. 28 E. 3. ca. 19. Rot. Parl. 50 E. 3. nu. 56. 61. 2 H. 4. nu. 22. optime. 4 H. 4. ca. 9. Rot. Parl. 9 H. 4. nu. 36. 42 Ass. p. 5. 12. 42 E. 3 ca. 3. Dier 1 Eliz. 106. Scrogs case.

And albeit divers of the Kings Courts in England proceed not according to the course of the Common law, yet are their proceedings allowed either by the Common law, or by some Act of Parliament.

Certain poor Christians that had spoken against the worshipping of Images, were by the Bishops sworn to worship Images; * which oath was against the the expresse law of God, and against the law of the land, for that they had no warrant

Dorf. clauf. An. 19 R. 2. nu. 17. * Exod. 20. 4. Deut. 5. 6.

Psalme 86. 11. 96 7. 115. 4. Levit. 26. 1. &c. Esay 44. 9. &c. Jeremy 10 3. &c. Sapient. 13. 10. &c. August. Epist. 110. ad Jan. ca. 11. idem de fide & symbolo ca. 7. idem in Psal. 113. con. 2.

Gregor. lib. 9. Epiſt. 9.

rant to miniſter the ſame. Let the children of the Church be called and inſtructed by the teſtimonies of the holy Scripture, that nothing made with hands may be worſhipped. See the ſecond part of the Inſtitutes, Marlbridge cap. 14 & 19. concerning oathes, and ſpecially out of Glanvile, concerning the Nobility of this Realme, and W. 1. ca. 38.

¶ By any having authority.] For where the Court hath no authority to hold plea of the cauſe, but it is coram non judice, there perjury cannot be committed. For as Bracton ſaith, Sacramentum habet in ſe tres comites, Veritatem, Juſtitiam & Judicium: veritas habenda eſt in jurato; juſtitia, & judiciũ in Judice.

Bracton lib. 4. fo. 186.

Jer. 4. 2.

And all this is grounded upon the law of God, Jurabis Vivit Dominus, in veritate, & in judicio, & in juſtitia.

¶ In any judiciall proceeding.] For though an Oath be given by him that hath lawfull authority, and the ſame is broken, yet if it be not in a judiciall proceeding, it is not perjury puniſhable either by the Common law, or by this Act, becauſe they are generall and extrajudiciall, but ſerve for aggravation of the offence, as generall Oathes given to Officers or Miniſters of Juſtice, Citizens, Burgeſſes, or the like, or for the breach of the Oath of Fealty or Allegeance, &c. they ſhall not be chargod in any Court judiciall for the breach of them afterwards. As if an Officer commit extortion, he is in truth perjured, becauſe it is againſt his generall Oath: and when he is charged with extortion, the breach of his Oath may ſerve for aggravation.

Trin. 13 Ja. Li. 11 f. 98. Bagges caſe.

If a man calleth another perjured man, he may have his Action upon his caſe, becauſe it muſt be intended contrary to his Oath in a judiciall proceeding: and ſo it is termed in our ſtatute of 5 Eliz. but for calling him a forſworne man, no Action doth lye: becauſe the forſwearing may be extrajudiciall. If the defendant perjureth himſelfe in his anſwer in the Chancery, Exchequer Chamber, &c. he is not puniſhable by this ſtatute, for it extendeth but to witneſſes, but he may be puniſhed in the Star-chamber, &c.

Bract. lib. 4. fol. 289. Fleta lib. 5. ca. 21

¶ Who ſweareth abſolutely.] For the depoſition muſt be direct and abſolute, and not ut putat, nor ſicut meminit, nor ut credit, &c.

¶ And falſely.] Herein the law taketh a diverſity betweene falſehood in expreſſe words, and that is only within this ſtatute, and falſehood in knowledge or minde, which may be puniſhed though the words be true. For example, damages were awarded to the plaintife in the Star-chamber according to the value of his goods riotouſly taken away by the defendant: the plaintiffe cauſed two men to ſweare the value of his goods, that never ſaw nor knew them; and though that which they ſware was true, yet becauſe they knew it not, it was a falſe oath in them, for the which both the procurer and the witneſſes were ſentenced in the Star-chamber.

Gurneis caſe in the Star-chamber Mic. 9. Jac.

Fleta, ubi ſupra.

For (as Fleta ſaith) Ad rectum juramentum exiguntur tria, veritas, conſcientia, & judicium: truth and conſcience in the witneſſe, and judgement in the Judge. And herewith agreeth Bracton, that a man may ſweare the truth, and yet be perjured. Dicunt quidam verum, & mentiuntur, & pejerant, eo quòd contra mentem vadunt. Ut ſi Judæus juraverit Chriſtum natum ex virgine, perjurium committit, quia contra mentem vadit, quia non credit ita eſſe ut jurat.

Bracton lib. 4. fo. 289.

Equivocation. Britton fo. 237.

By the ancient law of England in all Oathes Equivocation is utterly condemned; for Britton ſaith, Serement eſt honeſt, & leall, quant ſa conſcience demeſne accord a cheſcun point a la bouche ne pluis, ne meins, & ſil ad diſcord, donqs eſt perillous. And this is grounded upon the law of God. Nunquid Deus indiget mendacio veſtro, ut pro illo loquamini dolos, aut decipietur ut homo veſtris fraudulentiis? Perjuri ſunt qui ſervatis verbis juramenti decipiunt aures eorum qui accipiunt. If equivocation ſhould be permitted tending to the ſubverſion of truth, it would ſhake the foundation of Juſtice.

Job 13. 7.

¶ In

¶ In a matter materiall to the iſſue, or cauſe in queſtion.] For if it be not materiall, then though it be falſe, yet it is no perjury, becauſe it concerneth not the point in ſuit, and therefore in effect it is extrajudiciall. Alſo this Act giveth remedy to the party grieved, and if the depoſition be not materiall, he cannot be grieved thereby. And Bracton ſaith. Si autem Sacramentum fatuum fuerit, licet falſum, tamen non committit perjurium. Bract. lib. 4. 188. Fleta lib. 5. ca. 21. accord.

¶ By their own act, &c.] This clauſe of the Statute, although it be more generall then the clauſe of procurement, yet ſeeing the firſt clauſe concerning procurement, extended not to perjury upon an Indictment: this clauſe by conſtruction ſhall extend no further then the former. See Lib. Intr. Coke fo. 164, 165, 362. Flowers caſe, ubi ſupra.

¶ Or by the ſubornation of other.] Suborнation is derived of Sub and orno, and ornare in one of his ſignifications is to prepare, ſo as ſubornare is as much to ſay, as to prepare ſecretly, or underhand. Eſt autem ſubornare quaſi ſubtus in aure ipſum male ornare, unde ſubornatio dicitur de falſi expreſſione, aut de veri ſuppreſſione. And here is to be noted, that in the judgement of the Parliament Plus peccat author quam actor; for the ſuborner forfeits 40 li. & he that is ſuborned but 20 li. Fleta ſaith, Si ſervus cogatur ſcienter à Domino perjurare, uterque eſt perjurus; qui autem provocat eum ad jurandum quem ſcit falſum jurare, vel exigit, vel recipit juramentum, talis vincit homicidam, quia homicida ſolum corpus occidit, iſte vero animam ſuam & alterius: & peccat, qui alium audit falſum jurare, ſcit, & tacet. Fleta lib. 5. ca. 21.

In an Action of perjury brought upon this ſtatute, the plaintife counted, that the defendant falſo dixit & depoſuit, &c. and in what action, upon what iſſue, and in what Court, &c. and concluded, & ſic commiſit voluntarium & corruptum perjurium. And it was ruled by the whole Court, that the Count was vicious and inſufficient for two cauſes. Firſt, for that in this Act of 5 Eliz. as here it appeareth, there be two diſtinct clauſes, one if he be perjured of his own proper act; the other, if he be perjured by ſubornation, &c. and the plaintife ought to declare in certainty, within which of them the defendant is perjured. The ſecond cauſe was, where the Act ſaith [wilfully and corruptly commit any wilfull perjury, &c.] and the words of the Count be falſo dixit & depoſuit: and ſaith not, voluntarie & corrupte; and the ſaid clauſe, & ſic commiſit voluntarium & corruptum perjurium, ſalveth not the former inſufficiency, becauſe it is but a concluſion upon the former matter. Mic. 29. & 30. Eliz. coram rege.

And the like judgement was given in this Court, as to this latter point Anno 27 Eliz. in the caſe of one Mellers of Lincolneſhire. 27 Eliz. Mellers caſe.

¶ That as well the Judge and Judges of every ſuch of the ſaid Courts.] If the perjury be committed by any witneſſe depoſed in the Chancery, &c. and the party grieved commenceth his ſuit there upon this Act, the ſame and all the proceedings thereupon muſt be in Latin according to the courſe of the Common law, and the defendant ſhall not be ſworn to his anſwer, nor examined upon Interrogatories (unleſſe the Court of Chancery had before this Act uſed to examine perjuries, and to examine the defendant upon oath upon Interrogatories before this Act, for then ſuch juriſdiction had been ſaved by a Proviſo in this Act) and when iſſue is joyned, it ſhall be tried in the Kings Bench, as by Law it ought, & ſic de ſimilibus. Dier 12 El. 288.

If a man be taken for a ſuſpect, and he is not indicted, nor is there any certaine cauſe to arraign him, the Court may give him the Oath of Allegiance, viz. Que il ſerra foial & loyal, &c. Vide 45 E. 3. 17. b. ſimile devant cap. 7. De Conjuration, &c. in fine. 22 E. 4. 36. 20 H. 6. 37. Attorney abjure. 25 E. 3. 42. b. cor. 131.

See more of Perjury & of Witneſſes in the fourth part of the Inſtitutes. Cap. Commiſſioners for examination of witneſſes. See 21 Jac. cap. 20. a good Act to prevent and reforme prophane ſwearing.

CAP. LXXV.

Of Forging of Deeds, &c.

5 Eliz. cap. 14. IF any perſon or perſons upon his or their own head or imagination, or by falſe conſpiracy or fraud with others, ſhall wittingly, ſubtilly, and falſely forge, or make, or ſubtilly cauſe, or wittingly aſſent to be forged or made any falſe Deed, Charter, or Writing ſealed, Court Roll, or the Will of any perſon or perſons, in writing; to the intent that the ſtate of freehold or inheritance of any perſon or perſons, of, in, or to any lands, tenements, or hereditaments free-hold or coppy-hold, or the right, title, or intereſt of any perſon or perſons of, in, or to the ſame, or any of them, ſhall or may be moleſted, troubled, defeated, recovered, or charged, &c. Or ſhall pronounce, publiſh, or ſhew forth in evidence any ſuch falſe and forged Deed, Charter, Writing, Court-Roll, or Will, as true, knowing the ſame to be falſe and forged, as is aforeſaid, to the intent above remembred, and ſhall be thereof convicted, either upon action or actions of forger of falſe Deeds to be founded upon this Statute, at the ſuit of the party grieved, or otherwiſe according to the order and due courſe of the lawes of this Realme, or upon bill, or information, to be exhibited into the Court of Star-chamber, &c. ſhall pay to the party grieved his double coſts and damages, &c. And be it further enacted, that if any perſon or perſons, upon his or their owne head or imagination, or by falſe conſpiration or fraud had with any other, ſhall wittingly, ſubtilly, and falſely forge or make, or wittingly, ſubtilly, and falſely cauſe or aſſent to be made or forged, any falſe Charter, Deed, or Writing, to the intent that any perſon, or perſons, ſhall or may have or claime any eſtate or intereſt for terme of yeares, of, in, or to any Mannors, lands, tenements, or hereditaments, not being coppy-hold, or any Annuitie in fee-ſimple, fee-taile, or for term of life, lives, or yeares, or ſhall make or forge, as is aforeſaid, any Obligation or Bill Obligatory, Acquittance, Releaſe, or diſcharge of any debt, account, action, ſuit, demand, or other thing perſonall or ſhall pronounce, &c. *ut ſupra.* That then he ſhall pay, &c.

And be it further enacted, that if any perſon or perſons being hereafter convicted or condemned of any of the offences aforeſaid, &c. ſhall after any ſuch his or their conviction or condemnation eſtſoons commit or perpetrate any of the ſaid offences in forme aforeſaid, that then every ſuch ſecond offence or offences ſhall be adjudged felony, &c.

We have ſpoken of forgery or counterfeiting of the Great Seale of the Kings Coin, &c. which are declared by the ſtatute of 25 E. 3. to be High Treaſon: Now we are to treat of forgeries of Deeds, Charters, and Writings ſealed, &c. in the caſe of Subjects. And firſt, after our accuſtomed manner how theſe offences were puniſhed of ancient time.

Mir. cap. 4. § Des paines. Et cap. 5. § 1. The Mirror ſaith, Aſcuns peches ſont punies p̃ pde de poulce, come eſt de faulx notoires, &c. *peccans membrum puniebatur.* (Car pur fauxer de ſeale ne ſert judgement mortel.)

Britton

Britton ſaith, Judgement dée treyne, & de ſuffer mort doit encourr' ceux coure, q̃ p appeales de felony ſont atteints, q̃ ilz eyent le ſeale lour ſeignior, qui mainpaſt ils ſont, ou q̃ homes p homage counterfait, ou autrement fauſe, &c. Et ſi tiels manners des faits ſoient atteints a noſtre ſuit, ſi ſoient pur le ſeale fauſe juges a judgement de pillory, ou de perdre le oraile ſi le fait ſoit ſimple: Et ſi le fait ſoit grand & leyde, ſicome touchant diſheriſon ou perpetuall domage, ſi ſoient juges à la mort. Britton fo. 16. a. & b.

Fleta ſaith, Crimen falſi dicitur, cum quis accuſatus fuerit vel appellatus quòd ſigillum Regis, vel domini ſui de cujus familia fuerat, falſaverit, & brevia inde conſignaverit; vel cartam aliquam vel literam ad exhæredationem domini &c. ſigillaverit; in quibus cauſis ſi quis convictus fuerit, detractari meruit & ſuſpendi. Et quod de hujuſmodi falſariis dicitur, de ſigilla adulterina Cartis & Literis apponentibus dicatur id idem. And in another place he ſaith, Eſt etiam atrox injuria quæ perpetuam inducit infamiam cum pœna pillorari vel tumbrelli, quæ quandoque fit per falſarios ſigillorum (dum tamen non Regis nec domini ſui de cujus fuerit familia.) Fleta lib. 1. ca. 22. Fleta lib. 2. ca. 1.

We have the more willingly repeated theſe ancient puniſhments, to ſhew how in part, (viz. concerning the eares and Pillory,) this Act for the firſt offence concurreth with the ancient puniſhment.

¶ Forge.] To forge is metaphorically taken from the Smith, who beateth upon his Anvill, and forgeth what faſhion or ſhape he will: the offence (as it appeareth before) is called crimen falſi, and the offender falſarius, and the Latin word to forge is falſare or fabricare. And this is properly taken when the Act is done in the name of another perſon.

The ſtatute of 1 H. 5. hath theſe words [forge of new any falſe deed.] And yet if A make a feoffement by deed to B, of certaine land, and after A maketh a feoffement by deed to C of the ſame land with an antedate before the feoffement to B; this was adjudged to be a forgery within that ſtatute, and by like reaſon within this ſtatute alſo: & the rather in reſpect of the words ſubſequent, [or make, &c.] 26 H. 6. forger. 8. 27 H. 6. 3.

¶ Or make, &c.] Theſe be larger words then to forge: for one may make a falſe writing within this Act, though it be not forged in the name of another, nor his ſeale nor hand counterfeited. As if A make a true deed of feoffement under his hand and ſeale of the Manner of Dale unto B, and B or ſome other raſe out D the firſt letter of Dale, and put in S, and then where the true Deed was of the Manor of Dale, now it is falſely altered and made the Manor of Sale. This is a falſe writing under ſeale within the purview of this ſtatute. And ſo it is if a Rent Charge of one hundred pounds by the year be granted out of land in fee or for life, &c. and the grantee or any other raſe out one, and in ſtead thereof writeth two; this is a falſe writing within the danger of this ſtatute.

¶ Or ſubtilly cauſe, or wittingly aſſent.] To Cauſe, is to procure or counſell one to forge, &c. To Aſſent, is to give his aſſent or agreement afterwards to the procurement or counſell of another: To Conſent, is to agree at the time of the procurement or counſell, and he in Law is a procurer.

¶ Deed, Charter, or Writing ſealed.] It is required, that the Deed, Charter, or Writting muſt be ſealed; that is, have ſome impreſſion upon the wax, for Sigillum eſt cera impreſſa, quia cera ſine impreſſione non eſt ſigillum; and no Deed, Charter, or Writting, can have the force of a Deed without a Seale.

¶ Writing ſealed.] Theſe are large words: for the making of a falſe cuſtomary of a Manor in writing under ſeale, containing divers falſe cuſtomes tending to the diſheriſon of the Lord of the Manor, and that the ſame had been allowed Paſch. 15 Eliz. Dier. 322 James Taverners caſe. In Camera Stellata.

allowed and permitted by the Lords of the Mannor, &c. which was also false, was resolved to be within these words, [a false writing sealed.]

¶ Court Roll, or the Will of any person or persons in writing.] Here be two kind of Muniments that need not be sealed, because they may take effect without any seal, for that they be no Deeds; as Court rols concerning grants, surrenders, admittances, &c. of Copy or Customary lands: and the last Will in writing. If any person which writeth the will of a sick man inserteth a clause in his last will, concerning the devise of any lands or tenements, which he had in fee-simple, falsly without any warrant, or direction of the Devisor: albeit he did not forge, or falsly make the whole wil, yet is he punishable by this statute, as it hath been often holden in the Star-chamber against the opinion reported by my Lord Dier.

Dier 12 El. f. 288. Sir James Marvyns case.

¶ To the intent that the state of freehold or inheritance, of or in any lands tenements, or hereditaments, freehold or copyhold, shall or may be molested, troubled, defeated, recovered, or charged.] The great doubt upon this branch, and of the branch hereafter ensuing, was, for that it is not expressed by this Act, what estate, or interest should be mentioned to passe by the Deed, Charter, &c. whereby the estate of the freehold or inheritance should or might be molested, &c. or charged; whether if one did forge, &c. a deed, charter, &c. of an interest, or tearm of a hundred or a thousand years, &c. of lands, which are the freehold or inheritance of another, whereby the same shall or may be molested, &c. and the same question of a rent charge for years in the like case: and the doubt was the greater in respect of the clause hereafter ensuing, which is, To the intent that any person or persons shall or may have or claim any estate or interest for tearm of years of in or to any mannors, &c. And it was resolved, that a lease or charge for years of any lands being the freehold or inheritance of any person, was within this branch, for the clause is generall, not mentioning any estate or interest, &c. whereby the molestation, &c. should grow: and it was requisite it should extend to Leases or Charges for years, for otherwise mens estates of freehold or inheritance, &c. might be of little or no value: And accordingly it was resolved, Pasch. 38 Eliz. in the Star-chamber between the Lady Gresham Plaintif, and Roger Booth Scrivener of London, Markham and others Defendants, for the forging of a grant of a rent charge, by deed bearing date anno 21 Eliz. for ninety nine years to the said Markham out of all Sir Thomas Greshams lands of inheritance, & for publication thereof; and sentence given upon the said branch accordingly against Roger Booth for publication of the same.

Pasch. 38 Eliz. in Camera Stellata the Lady Greshams case.

And the said branch after ensuing, is to be understood when the forgery, &c. is to the molestation of a Termor. As if A. be possessed of a lease of lands for years, and B. in his name doth forge an assignment to C. of his tearm, this is directly within the letter and meaning of this branch, and the rather in respect of those things that be joyned therewith under the same punishment.

¶ Or the right, title, or interest of any person or persons in or to the same.] These words were added, for that the statute of 1 H. 5. being to undoe, and trouble the possession and title (in the Conjunctive) of the said Kings liege people: doubt was made whether a forgery to bar one that had but a bare right or title, and no possession, was within that statute: and therefore this clause of 5 Eliz. added this clause in the Disjunctive, as here it appeareth. But now by a speciall branch of this Act the statute of 1 H. 5. cap. 3. being doubtfully penned, is repealed by a clause in this Act, and greater punishment inflicted by this statute.

Vide 4 H. 6 25. 8 H. 6. 33. 20 H. 6. 33 H. 6. 23. 15 E. 4. 24. Pl. com. 88.

¶ Or

¶ Or ſhall pronounce, publiſh, or ſhew forth in evidence any ſuch falſe and forged deed, &c. as true, knowing the ſame to be forged.] Here be two things to be explained: firſt, what it is to pronounce, or publiſh as true. Secondly, what knowledge is ſufficient.

To pronounce or publiſh is, when one by words or writing pronounceth or publiſheth the deed, &c. to any other as true.

¶ Knowing the ſame to be forged.] This knowledge may come by two means, either of his own knowledge, or by the relation of another. As if A. telleth B. that ſuch a deed is falſe and forged, and yet B. will after pronounce or publiſh this to be a true deed, and afterwards it falleth out by proof that the relation of A. was true, and the deed in truth was forged, B. is in the danger of this ſtatute: and ſo was it reſolved in the aboveſaid caſe of the Lady Greſham, againſt Roger Booth, &c. ubi ſupra, and ſentence given accordingly.

¶ And that the Defendant ſhall ſuffer upon the Pillory the corporall penance, &c.] And there is a clauſe that the Plaintif ſhould not releaſe nor diſcontinue the puniſhment, &c. but only coſts and damages: and yet it was reſolved that the Queen might pardon the corporall puniſhment, which trencheth to common example. Dier 15 Eliz. Taverners caſe, ubi ſupra.

And upon the ſtatute of W. 2. ca. 25. which giveth two years impriſonment in a raviſhment of ward, the King may pardon the ſaid corporall puniſhment of impriſonment. And the puniſhment of finding of ſurety, and forjuring the Realm, &c. upon the ſtatute of W. 2. cap. 28. De maleſactoribus in parci, may be pardoned by the King. Paſch. 34 E. 3. Coram Rege, Rot. 30. Kane' the caſe of Godi-tha Waldiſh. Dier 7 El. 238.

¶ Any falſe charter or deed.] This muſt be intended to be ſealed according to the former clauſe, though it be not here ſpecified.

¶ To the intent that any perſon or perſons ſhall or may have or claim any eſtate or intereſt for tearm of years.] This branch hath been explained before in the former part of this ſtatute. Pl. com. 80. b.

¶ Not being copyhold.] This needeth no explication.

¶ Or annuity.] This is evident.

¶ Any obligation, or bill obligatory.] Theſe muſt be intended to be ſealed: If a man forge a Statute ſtaple, or a Recogniſance in the nature of a ſtatute ſtaple, that is, acknowledge them, or either of them in the name of another; theſe are obligations within this Act, for each of them hath the ſeal of the party. But otherwiſe it is of a Statute merchant, or of a Recogniſance, becauſe they have not the ſeal of the Conuſor. F. N. B. 96. b. c. & 10. a. 15 H. 7. 15. &c.

¶ Or writing.] This extends to a teſtament in writing, whereby a tearm for years or goods and chattels be deviſed, and the former branch extendeth to a Will in writing, concerning freehold and inheritance. Dier 13 El. 302. b.

¶ Acquitance, releaſe or diſcharge.] Lodowick Grevil Eſquire was bound by recogniſance of two hundred pound, to Rowland Hinde of the Inner Temple, for payment of one hundred pound. Hinde wrote a letter to Grevil, and writ his name in the loweſt part of the letter; (as many uſe when they write to men of great calling) Grevil cauſed the letter to be cut off, and a generall releaſe in few words to be written above Hindes name, and took off Hindes ſeal, and fixed it under the releaſe: ſo there was Hindes hand and ſeal to this releaſe, Mich. 13 & 14 El. in Camera Stellata inter Hinde & Grevill.

releaſe. Hinde being not paid his hundred pound, brought a Scire fac' upon the recogniſance, whereunto Grevill pleaded this releaſe, Hinde pleaded non eſt factum, and tried his deed, whereupon judgement was given againſt him, whereby Hinde was barred of his debt. For this forged releaſe Grevill was ſentenced in the Star-chamber upon this ſtatute.

¶ Shall pay to the party grieved, his double damages.] Upon theſe words in the caſe aforeſaid, between Hinde and Grevill, the queſtion was, whether Hinde ſhould have double damages in reſpect of the penalty, viz. the two hundred pound, or of the hundred pound, the due debt appearing in the condition of the recogniſance. And it was reſolved, that damages ſhould be aſſeſſed by the Court to double the penalty, for the penalty ſhould be recovered by law if the forged releaſe had not been: and this was reported by the Lord Dier, and imprinted, and ſince omitted out of the print.

¶ Being hereafter convicted or condemned of any of the offences aforeſaid, ſhall, &c. eſtſoons commit, &c. any of the ſaid offences.] Here be four kind of offences; the firſt concerning moleſtation, &c. of freehold and inheritance. Secondly, the publication of the ſame knowing, &c. The third concerning a tearm for years, annuities, and demands perſonals. Fourthly, the publication thereof.

Paſch. 7 Ja. Inter Sir Will. Reade Pl. & Rogerum Booth & alios Def. in Camera Stellata.

Now the queſtion upon this branch concerning felony, was, that whereas the ſaid Roger Booth was convicted in the Star-chamber for the publiſhing of the forged grant by deed of a rent charge of a hundred pound per annum, as is aforeſaid; afterwards the ſaid Roger and others were charged in the Star-chamber with the forging of a deed of feoffment in the name of Sir Thomas Greſham bearing date 20 Eliz. but forged long after: whether this ſecond forgery was felony, or no, within this branch: and the doubt did riſe upon the ſaid words [eſtſoons] commit any of the ſaid offences. And it was objected, that by reaſon of this word [eſtſoons] iterum, the ſecond offence muſt be of the ſame nature as the firſt offence was; as the firſt offence being for publication of a forged deed, &c. the ſecond offence muſt be for the publication of another forged deed, &c. and upon that branch whereupon the firſt offence was grounded, or elſe it was ſaid, it was not iterum, which word was in ſignification quaſi iter unum, that is to ſay, per idem iter, and it is ſo taken for the ſecond time. Primo quidem decipi, incommodum eſt, iterum ſtultum, tertio turpe: which doubt was referred to the conſiderations of the two Chief Juſtices, and Chief Baron, who upon hearing of Councell learned of both ſides, and upon conference, and conſideration had of this Act, reſolved, that the ſecond offence was felony within the words, and meaning of this Act, for the words be expreſſly, being condemned of any of the ſaid offences, eſtſoons commit any of the ſaid offences. So as by reaſon of theſe words, any of the ſaid offences, this word [eſtſoons] is well ſatisfied, if he commit the ſecond time any of them: and ſo theſe words any of the ſaid offences extend to any of the ſaid four offences before mentioned. And it was alſo reſolved by them, that by reaſon of this word [eſtſoons] the ſecond forgery, &c. muſt be committed after the firſt conviction, or elſe it is no felony.

Cicero lib. 1. de Invent.

¶ Provided always, &c. that if any perſon, &c. hath of his own head, &c. forged or made, &c. Or if any perſon, &c. hath heretofore publiſhed or ſhewed forth any falſe deed, &c.] Hanford before this ſtatute forged a leaſe for years of the Land of the Lord Williams of Thame, which leaſe after by Weynman (which had married one of the daughters and heirs of the ſaid Lord Williams) was impeached, but not as forged, and by compoſition for two hundred pound was redeemed by Weynman, and the leaſe was cancelled. And after Weynman perceiving the leaſe to be forged, ſued Hanford in the Chancery to have reſtitution of the two hundred pound, and

Trin. 11 El. Dier in a manuſcript not printed.

and there Hanford after this ſtatute of 5 Eliz. maintained the leaſe as good and true: whereupon Weyman ſued Hanford in the Star-chamber, where by the opinion of the Chief Juſtices it was holden, that it was not within this ſtatute, becauſe that the Deed was cancelled, and Hanford made no title to the intereſt of the tearm.

¶ Provided always, &c. that this Act or any thing therein contained, ſhall not extend to any perſon that ſhall plead or ſhew forth any Deed or Writing exemplified under the Great ſeal of England, or under the ſeal of any other authentique Court of this Realm, nor ſhall extend to any Judge or Iuſtice, or other perſon that ſhall cauſe any ſeal of any Court to be ſet to ſuch Deed, Charter, or Writing enrolled, not knowing the ſame to be falſe or forged.

This muſt be intended of a Deed or Writing, which by law may be exemplified: for the knowledge whereof we will report a reſolution of the whole Court of the Common pleas. The iſſue between the ſaid parties to be tried at the bar was, whether the laſt Abbot of Abbingdon, and all his Predeceſſors, &c. held certain lands in the parith of Saint Ellens, &c. diſcharged of the payment of Tithes: and the Plaintif offered to ſhew in evidence to prove the ſaid land to be diſcharged of payment of Tithes, a Vidimus, or Innoteſcimus under the Great Seal in theſe words: Vidimus quendam antiquum librum in pergameno intitulatum Volumen de copiis munimentorum ſeu diverſorum geſtorum, & actorum monaſterii de Abbingdon. In which book was a copy of a Bull of the Pope, for the diſcharge of the ſaid land for payment of tithes, which was but part (amongſt other things) of the ſaid book. And by the opinion of the whole Court, hearing of the counſell of both parties, it was reſolved that the ſaid exemplification ought not to be given in evidence to the Jury for theſe cauſes: Firſt, becauſe that which was exemplified, was not of record; for neither Deed, Charter, or other Writing, either ſealed, or without ſeal, ought to be exemplified under the Great Seal, or any other Seal in Court of Record, for ſeals of Courts of record ought not to exemplifie any thing but that which is of record, becauſe records be publique, whereunto every ſubject may have recourſe to conſer the exemplification with the Record it ſelf, and Records be in the cuſtody of ſworn Officers, and therefore no inconvenience can follow upon the exemplification of them. But a Deed, Charter, and other Writings are private, and remain in the cuſtody of the party, and may be raſed, interlined, or corrupted in points materiall, and if they ſhould be exemplified, the raſure, interlineation, and corruption ſhall not appear therein. Alſo the Deed, Charter, or other writing may be forged, and if they ſhould be exemplified, then the exemplification might ever be ſhewed in evidence, and not the Deed, &c. it ſelf, and ſo the forgery, and falſity ſhould never upon the view of the Deed, or of the ſeal, or other things riſing upon the view, be diſcovered. Moreover if a forged Deed ſhould be exemplified, then the effect of this ſtatute concerning publication ſhould be taken away; for then the forged deed, &c. it ſelf might never be publiſhed, or given in evidence, but the exemplification, and ſo this ſtatute in that point deluded: and therefore where this ſtatute, or any other ſtatute or book ſpeaks of an Exemplification, Vidimus or Innoteſcimus of a Deed, &c. it muſt be intended of a Deed inrolled, viz. the Exemplification, Vidimus, or Innoteſcimus of the inrolment thereof, which is of record. It was further reſolved that no Record, or inrolment of any Record, may be exemplified under the Great Seale, but of a Record of the Court of Chancery, or other Record duly removed thither by Certiorari, &c. Furthermore it was reſolved that no exemplification ought to be of any part of a Letters Patents, or of any other Record, or of the inrolment thereof, but the whole Record or the inrolment thereof ought to be exemplified, ſo that the whole truth may appeare, and not of ſuch part, as makes for the one party,

Mich. 10 Jacobi Regis in Communi banco in a prohibition between Tho. Read Pl. and Avis Hide, and Rich. Hide Defendants.

Mich. 29 & 30 Eliz. lib. 5. fo. 54. in Pages caſe.

and nothing that make against him, or that manifesteth the truth. Lastly, in the case at the Barre, the said Book was intituled, Volumen de copiis munimentorum, & diversorum gestorum. So as seeing the Bull it selfe (being no matter of Record) could not be exemplified; à fortiori, no exemplification could be had of the copie of the same. And if Bulls, &c. might be exemplified, then there might be an evasion to make the statute of 28 H. 8. cap. 16. of small force, which prohibiteth pleading, or alledging of Bulls, &c. under paine of a Præmunire, as by that Act appeareth.

28 H.8.cap.16. 1 & 2 Ph. & Mar. cap.8. 1 Eliz.cap.1.

CAP. LXXVI.

Of Libels and Libellers.

WHat a Libell is, how many kindes of Libels there be, who are to be punished for the same, and in what manner, you may read in my Reports, viz. Lib.5. fo.124,125. Lib.9. fo.59. To these you may adde two notable Records. By the one it appeareth, that Adam de Ravensworth was indicted in the Kings Bench for the making of a Libell in writting, in the French tongue, against Richard of Snowshall, calling him therein, Roy de Raveners, &c. Whereupon he being arraigned, pleaded thereunto not guilty, and was found guilty, as by the Record appeareth. So as a Libeller, or a publisher of a Libell committeth a publick offence, and may be indicted therefore at the Common Law.

Mic.10.E.3.coram Rege. Rot.92.Eborum.

John de Northampton an Attorney of the Kings Bench, wrote a Letter to John Ferrers one of the Kings Councell, that neither Sir William Scot Chiefe Justice, nor his fellowes the Kings Justices, nor their Clerks, any great thing would do by the commandement of our Lord the King, nor of Queen Philip, in that place, more then of any other of the Realme; which said John being called, confessed the said Letter by him to be written with his own proper hand. Judicium Curiæ. Et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de concilio Regis, quæ litera continet in se nullam veritatẽ: prætextu cujus Dominus Rex erga Curiam & Justiciarios suos hic in eâ habere posset indignationem, quod esset in scandalum Justic' & Curiæ. Ideo dictus Johannes committitur Maresc' & postea invenit 6 manucaptores pro bono gestu.

Mic.18 E.3. coram Rege. Rot. 151. Libellum.

CAP.

CAP. LXXVII.

Of Champerty, Imbracery, Maintenance, &c.

SEE the first part of the Instit. Sect. 701. Verb. Maintenance. And the second part of the Institutes, W. 1. cap. 8. 32. & W. 2. cap. 49. & the exposition upon the same. See also the statute of 32 H. 8. cap. 9. in the first part of the Institutes, *ubi supra*. Rot. Parl. 17 R. 2. nu. 10. John de Winsors case. And the fourth part of the Institutes, cap. Chancery. Whereunto you may adde, that where by the statute of 6 H. 6. cap. 2. it is recited, that divers in times past have been disherited, because that in speciall Assises the Tenant and Defendant might not have knowledge nor copie of the pannell of them that be impannelled to passe in the said Assises, to informe them of their right and title before the day of the Session that the Assises shall be demanded; which is a rehearsall of the Common law, but so to be understood, that both parties plaintiffe and tenant, &c. be present, when such information is given, and consenting thereunto: otherwise, if one of them informeth in the absence of another, it is unlawfull, and a good cause of challenge of such of the Jury as shall be so on the one part informed: for every Jury must be indifferent, as he stand unsworne.

CAP. LXXVIII.

Of Barretry.

SEE the first part of the Institutes, Sect. 701. Verb. Barretors. See the statute of Ragman, temps E. 1. whereby the Commission of Trailebaston is raised. It is thus provided. Et pur ceo q̄ en tiels maners de quereles doit le court le roy eē favourable, voet le roy, & enjoint' les Justices q̄ nul enquerelant, ne respoignant ne soit surprise nencheson per Hockettours, ou Barrettours, pou que le veritie ne soit ensue. Vet. Mag. Carr. cap. 28. 2 part.

Hockettors or Hocquetours is an ancient french word for a knight of the Post, (worthy to be knit to a post) a decayed man, a basket-carrier.

For Barrettors, see the first part of the Institutes, *ubi supra*.

CAP. LXXIX.

Of Riots, Routs, Vnlawfull Assemblies, Forces, &c.

Riotum commeth of the french word, Rioter. i. Rixari: and in the Common law signifieth, when three or more do any vnlawfull act, as to beat any man, or to hunt in his Park, Chase, or Warren, or to enter or take possession of another mans land, or to cut or destroy his corne, grasse, or other profit, &c.

* Latine Turba. —comes est discordia vulgi; Namq; a turbando nomen sibi turba recepit. Lamb. int. Leg. Inæ ca.13,14,15. Vide Alvered. cap.26.

* Turma quasi tordena.

* Routa is derived of the french word Rout, and properly in law signifieth, when three or more do any vnlawfull act for their own, or the common quarrell, &c. As when Commoners breake down Hedges, or Pales, or cast down Ditches, or Inhabitants for a way claimed by them, or the like.

An vnlawfull assembly is when three or more assemble themselves together to commit a Riot or Rout, and do it not. Prædones autem nominamus usq; numerum septem virorum; deinde (quousq; numerus 35 coaluerit) * Turmam (Saxonicè *hloth*) dicimus; numerus si excreverit, exercitum vocamus, *hlothbota*, to be quit of vnlawfull assemblies.

One may commit a Force. But of this, that I may not vnprofitably repeat, you may reade at large Fitzherbert, and those others that have written of this Argument.

Regula. Interest regi habere subditos pacatos. Vis legibus est inimica. See Lib. 5. fo. 91. & 115. Lib.11. fo.82. See the first part of the Institutes, Sect.431.440. Custum. de Norm. cap.52. fo.66,67.

CAP. LXXX.

Of Quarrelling, Chiding, or Brawling by words in Church or Church-yard.

1 E.6.cap.4. The offender being a Lay-man, is to be suspended by the Ordinary ab ingressu Ecclesiæ, and being a Clerk from the ministration of his Office, so long as the Ordinary thinks meet according to the fault.

CAP.

CAP. LXXXI.

Of Smiting, or laying violent hands upon another in Church or Churchyard.

The offender ſhall be deemed ipſo facto excommunicat, and excluded from the company of Chriſts congregation.

5 E. 6. ubi ſupra. V. Lib. 6. fo. 29. b. Grenes caſe, ſim.

CAP. LXXXII.

Of malicious ſtriking with any weapon, or drawing of any vveapon in Church or Churchyard, to the intent to ſtrike another, &c.

The offender being convict by the oath of twelve men, or by his own confeſſion, * or by two lawfull witneſſes, before Juſtices of Aſſiſe, Juſtices of Oier and Terminer, or Juſtices of Peace in their Seſſions, ſhall loſe one of his eares: and if he hath no eares, to be marked in the cheek with a hot Iron with the Letter F, and ipſo facto be excommunicate.

5 E 6. ubi ſup. * Note the diſjunctive. Int. leg. Inæ. ca. 6. Qui in templo pugnaverit 120 ſolidis noxiam facito. Dier 23 Eliz. 177 Caſe ultim.

CAP. LXXXIII.

For ſtriking, &c. in any of the Kings Courts of Juſtice: and for ſtriking, &c. in any of the Kings Houſes, &c.

See before in the Sixty fifth Chapter of Miſpriſion, that is, Crimen commiſſionis.

CAP.

CAP. LXXXIV.

Againſt Fugitives, or ſuch as depart out of the Realme without licenſe, and ſuch as are beyond Sea, and returne not upon command.

Ovidius. *Omne ſolum forti patria eſt, ut piſcibus æquor,*
Et volucri, vacuo quicquid in orbe patet.

IT is firſt to be ſeen of Acts in Parliament publiſhed in print, which of them are abrogated and repealed, and which of them ſtand in force. The ſtatute of 5 R.2. cap. 2. is repealed by the Statute of 4 Jac. cap.1. And the Statutes of 12 R.2.ca.15. 13 Eliz. cap.3. & 14 Eliz.cap.6. are expired. The Statute of 12 R. 2. Such as paſſe the ſea, or ſend out of the Realme to provide or purchaſe any benefice of holy 25 H.8.cap.19. Church, with cure or without cure, are in danger of a Præmunire. No perſon reſiant within any of the Kings Dominions, ſhall depart out of any of thoſe 1 Eliz.c.1.revive. Dominions, to any Viſitation, Congregation, or Aſſembly for Religion.

1 Jac.cap.4. 3 Jac.cap.5. Anno 1 Jac. cap.4. and 3 Jac. cap.5. Againſt going or ſending of children to any Seminary beyond Sea, and againſt the departure out of the Realme (without licenſe) of any children not being Souldiers, Mariners, Merchants, or other Apprentiſes or Factors, for any cauſe whatſoever. And Anno 3. Ja. ca.4. againſt impoſing felony upon any ſubject that ſhall depart this Realme, to ſerve any Prince, State, or Potentate: or ſhall paſſe over the Seas, and there ſhall voluntarily ſerve any ſuch forraine Prince, State, or Potentate; not having before his or their going or paſſing, taken the Oath mentioned in that Act. And likewiſe impoſing felony upon any Gentleman or perſon of higher degree, or any perſon which hath borne, or ſhall beare any office, or place of Captaine, Lieutenant, or any other place, charge, or office in Campe, Army, or Company of ſouldiers, or Conducter of ſouldiers, that ſhall goe, or paſſe voluntarily out of this Realme, to ſerve any ſuch forraine Prince, State, or Potentate, or ſhall voluntarily ſerve any ſuch forraine Prince, State or Potentate, before he be bound by Obligation with two ſureties, as in that Act is preſcribed. But it is provided that upon the attainder of any ſuch felony, no forfeiture of dower or corruption of blood ſhall enſue. Reade over theſe Statutes, for they are ſo plainly penned, as they need no expoſition.

Next unto this, two things fall into conſideration. Firſt, what Acts of Parliament not publiſhed in print in our Books of Statutes do prohibit men to paſſe the ſeas without licenſe. And ſecondly, what may be done therein by the Common law of England.

At the Parliament holden at Clarendon, Anno 10 H. 2. called the Aſſiſe of Clarendon, Facta eſt recognitio cujuſdam partis conſuetudinum & libertatum anteceſſorũ Regis, & ca. 4. ſic recognitũ eſt. Archiepiſcopis, Epiſcopis, & perſonis regni non licet exire regnum abſque licentia Domini Regis, & ſi exierint, ſi Regi placuerit, ſecurũ eum facient, quòd nec in eundo nec in redeundo, nec morã faciendo perquirent malum ſeu damnum Domino Regi vel regno.

This appeareth in it ſelfe to be but a recognition, or declaration of the Common law: and this is manifeſtly proved by the Writ in the Regiſter at the Regiſt.fo.89,90. Common law, purſuing in effect the very words of the ſaid Act of 10 H. 2. Breve Fit.N.B.85. de ſecuritate invenienda, quod ſe non divertat ad partes exteras ſine licentia Regis.

And

And hereupon there ariſeth a diverſity between one of the Clergie, and one of the Laity: for a man of the Church may be compelled to put in ſurety, that he ſhall not depart the Realme without the Kings licenſe, nor ſhall there attempt any thing in contempt or prejudice of the King or of his people. And this Writ is directed to the Sheriffe, and ſaith, Quia datum eſt nobis intelligi, quòd A. B. Clericus verſus partes exteras ad quam plura nobis & quam pluribus de populo noſtro præjudicialia & damnoſa ibid. proſequend', &c. Whereby it appeareth, that this Writ lyeth only in the caſe of an Eccleſiaſticall perſon, or a man of the Church, and that for three reaſons. Firſt, for that they had the cure of ſoules, and therefore ought to be reſident. Secondly, for that they, maintaining forraine authority, impugned many of the Kings lawes, to the great prejudice of the Laity. Thirdly, they had no temporall lands, therefore they found ſureties.

Vide ſimile Regiſt. 61, &c. Ad jura Regia. Regiſt. fo. 193. De licentia tranſ. fretandi pro religioſis.

There is another Writ in the [a] Regiſter, that is to be directed to the party himſelfe, viz. either to the Clerk, or to the Layman, wherein the King reciting, Quod datum eſt nobis intelligi, quod tu verſ. partes exteras abſque licentia noſtram clam deſtinas te divertere, & [b] quamplurima nobis & coronæ noſtræ prejudicialia ibid. proſequi intendas, &c. ſub periculo quod incumbit prohibemus, ne verſ. partes exteras abſque licentia noſtra ſpeciali aliqualiter te divertas, nec quicquam ibid. proſequi, &c. And upon this Writ the party is not to finde any ſurety, for there is no word of ſurety in this Writ. And if the [c] ſubject cannot be found, the King may make a Proclamation under the Great Seale, to the effect of the Writ laſt mentioned.

a Regiſt. 89, 90. F.N.B. fo. 85.

b So as neither this Writ, nor a Proclamation in nature of this Writ ought to be granted, but where the party intends to depart the Realme for theſe ends.

c F.N.B. fo. 85. b. Vide Dier 1 Eliz. 165. b.

Now let us peruſe ſuch authorities as we finde in Records or Books of Law in ſerie temporis, taking ſome few examples for many that might be cited.

[d] Willielmus Marmion Clericus profectus eſt ad Regem Franciæ ſine licentia Domini Regis, & propterea finem fecit, &c. Note the going over without any prohibition precedent unlawfull.

d Rot. Finium 6 H. 3. Et Rot. clauſ. 7 H. 3. m. 5.

[e] Nul grand Seignior ou Chivalier de noſtra Realm ne doit prender chemin (daler hors de Realm) ſans noſtre conge, car iſſint purroit le Realm remain diſgarne de ſort gents. And the [f] Nobles & Peers of the Realm are of the Kings great Councel.

e Britton temps E. 1. fo. 282, 283. Vide ſtatut de 5 R. 2. ca. 2. Seigniors except out of that ſtatute.

f See the firſt part of the Inſtit. Sect. 164. f. 110. a. 27 Auguſt 5 H. 4. De ſon grand councell.

By this it appeareth, that theſe are prohibited to goe beyond ſea without licenſe: but others of the inferiour Laity may go without licenſe, if they travell not to the abovеſaid prohibited ends. But [g] thoſe of the Laity and men of the Church alſo being beyond ſea, may be commanded by the Kings Writ, either under the Great Seale, or Privie Seale, in fide & ligeantia, &c. to returne into the Kingdome (though he be not there to any of the abovеſaid prohibited ends;) and if he returne not, for his contempt his lands and goods ſhall be ſeiſed, quouſque, &c. [h] Commandement was given to an Eccleſiaſticall perſon reſiding at Rome to returne into England.

g An. 19 E. 2. in Scac. 2 & 3 Ph. & Mar. Dier 128. pl. 61. Will. de Britaine Countee de Richmonds caſe.

h Rot. clauſ. 4 E. 3. m. 38.

[i] Quamplurimæ literæ Domini Regis miſſæ Romæ, and revocand' diverſos Clericos ibid. commorantes, qui quamplurima attemptarunt in dedecus Regni, præcipient' etiam, quòd redeant ad feſtum eis appunctuatum: & pro eo quòd non venerunt, præceptum fuit vicecomiti quod eos capiat. Et Rogerus de Holme Præbendarius in Eccleſia Sancti Pauli London captus per Vic' London, & arenatus, examinatus, & convictus mittitur priſonæ Turris London ibid. moraturus, &c.

i Hil. 24 E. 3. coram Rege, Rot. 13.

[k] Rex proclamari fecit in omnibus comitatibus Angliæ, quòd ne quis comes, baro, miles, religioſus, ſagittarius, aut operarius, &c. extra regnum ſe transferat, ſub pœna areſtationis. & incarcerationis.

k Dorſ. clauſ. 25 E. 3. m. 18.

Herein it is to be obſerved, that ſeeing by law, no Earle, Baron, or Knight (as Britton ſaith) nor religious, &c. ought to goe out of the Realme, a generall Proclamation declarative will ſerve to aggravate their offence: but otherwiſe it is of thoſe, that are not prohibited by law, they muſt have ſuch a particular Writ or Proclamation as is abovеſaid.

[l] Sir Matthew Gourny Knight was prohibited by the Kings Writ to depart the Realm, and to ſerve in wars expreſly inhibited by the King; which notwithſtanding he did. Now the Record ſaith, Quia Mathæus Gourny miles contra defenſionem Regis transfretavit, & ſe guerris ſibi per regem inhibitis immiſcuit, tam in corpore, quam in bonis [m] forisfecit Regi manerium de Corimallet ſimul cũ una Carucat' terræ, &c.

l Mic. 39 E. 3. coram Rege. Rot. 97. Somerſ. Rot. Vaſc. 10 E. 3. m. 29.

m By ſeiſure and impriſonment.

Rex

[a] Rex licentiam dedit Abbati de E. quòd proficiſci poſſit ultra mare ad viſitandum caput Sancti Johannis Baptiſtæ Ambiani, corpora trium regum Coloniæ, feretrum Sancti Franciſci in & Sanctum Jacobum in Galicia, ita quod non proſequetur, aut procurabit quicquam in præjudicium regis, aut * legum ſuarum, ſicut idem Abbas in præſentia Cancellarii regis per juramentum promiſit.

a Rot. Pat. 40 E. pt 1. nu. 40. Mich. 41 E. 3. Coram Rege Rot. 34. Prioriſſa Sancti Barth. & de novo Caſtro quod mare non tranſibit, &c.
* Nota (legum ſuarum) ut ſupra.

Note that Eccleſiaſticall perſons could not goe beyond ſea on Pilgrimage without licence, nor to doe any thing in præjudice of the King, or his lawes.

[b] And it is to be obſerved that the King may grant licence to travail beyond the ſeas, either under the Great Seal, Priuy Seal, or Priuy Signet, but he cannot recall one that is beyond ſea, but by the Great Seale, or Priuy Seal.

b F.N.B. 85. f.

But for avoiding of tediouſneſſe, and heaping many to one end, let us deſcend to later times.

[c] The Letters under the Great Seal, or Priuy Seal to recall any from beyond ſea, ought to be ſerved by ſome [d] meſſenger, who upon his oath is to make a certificate thereof in the Chancery, and from thence a Mittimus to be ſent into the Exchequer, and thereupon a Commiſſion to be granted to ſeiſe the lands and goods of the Delinquent.

c Dier Hil. 2 Eliz. 176. the caſe of Barteu and the Dutches of Suffolk.
d See 10 H. 4. 5. Englefields caſe. Lib. 7. fo. 11.

[e] Mich. 12 & 13 Eliz. It was reſolved by all the Juſtices (except two) that a Merchant of London departing the Realm, to the intent to live freely from the penalty of the law, and out of his due obedience to the Queen, and not to any Merchandiſe, that it was no contempt to the Queen, for Merchants were excepted out of the ſaid ſtatute of 5 R. 2. cap. 2. and by the Common law Merchants might paſſe the ſea without licence, though it were not to merchandize.

See the 1. part of the Inſtitutes Sect. 102.
e Mich. 12 & 13 El. Dier f. 296. & Paſc. 23 Eliz. fo. 375.

It is holden, and ſo it hath been reſolved, that divided Kingdomes under ſeverall Kings in league one with another are ſanctuaries for ſervants or ſubjects flying for ſafety from one Kingdome to another, and upon demand made by them, are not by the laws and liberties of Kingdomes to be delivered: and this (ſome hold) is grounded upon the law in Deuteronomy. Non trades ſervum domino ſuo, qui ad te confugerit.

Deut. c. 23. v. 15.

When Queen Elizabeths Ambaſſadour lieger in France, anno 34 of her reign, demanded of the French King Morgan and others of her ſubjects, that had committed treaſon againſt her; the anſwer of the French King to the Queens Ambaſſadour is truly related in theſe words. Si quid in Gallia machinarentur, regem ex jure in illos animadverſurum; ſin in Anglia quid machinati fuerint, regem non poſſe de eiſdem cognoſcere, et ex jure agere. Omnia regna profugis eſſe libera, regum intereſſe, ut ſui quiſque regni libertates tuertur. Immo Elizabetham non ita pridem in ſuum regnum Mountgomerium, principem Condæum, et alios è gente Gallica admiſiſſe, &c. and ſo it reſted.

Camden Elizab. pa. 355.

King H. 8. in the 28. year of his reign being in league with the French King, and in enmity with the Pope, who was in league with the French King, ſent Cardinall Pool Ambaſſadour to the French King, of whom King H. 8. demanded the ſaid Cardinall being his ſubject, and attainted of treaſon, and to that end cauſed a treatiſe to be made (which I have ſeen) that ſo it ought to be done jure gentium: ſed non prævaluit. But Ferdinando King of Spain upon requeſt made by H. 7. to have Edmond de la Pool Earl of Suffolk attainted of High Treaſon by Parliament, anno 19 H. 7. at the firſt intending to obſerve the priviledge and liberty of Kings, to protect ſuch as came to him for ſuccour, and protection, delivered him not, yet in the end upon the earneſt requeſt of H. 7. and promiſe that he would not put him to death, cauſed the ſaid Earl to be delivered unto him, who kept him in priſon, and conſtruing his promiſe to be perſonall to himſelf, commanded his ſon Henry after his deceaſe to execute him, who in the firſt year of his reign upon cold blood perfourmed the ſame.

An. 21 H. 7. Rot. Parl. 19 H. 7.

We could add more examples of this kind, but (to ſpeak once for all) having purpoſed

purpoſed to give ſome taſte of every thing pertinent, or incident to ſuch things, as we have undertaken to treat of, theſe ſhall ſuffice.

See the ſtatute of 3 Car. an Act to reſtrain the paſſing and ſending of any to be Popiſhly bred beyond the Seas. 3 Car.ca.2.

* *Flemenesfreme*, ſive *Flemenesfrenthe*, interpretatur, Catalla fugitivorum. * Mich.10 H.4. Coram Rege, Rot.59 Hertford.

CAP. LXXXV.

Againſt Monopoliſts, Propounders, and Projectors.

IT appeareth [a] by the Preamble of this Act (as a judgement in Parliament) that all Grants of Monopolies are againſt the ancient and Fundamentall laws of this Kingdome, and therefore it is neceſſary to define what a Monopoly is.

a The ſtatute of 21 Jac.ca.3. Rom.1.30. Inventores malorũ.

[b] A Monopoly is an Inſtitution, or allowance by the King by his Grant, Commiſſion, or otherwiſe to any perſon or perſons, bodies politique, or corporate, of or for the ſole buying, ſelling, making, working, or uſing of any thing, whereby any perſon or perſons, bodies politique, or corporate, are ſought to be reſtrained of any freedome, or liberty that they had before, or hindred in their lawfull trade.

b A Monopoly deſcribed. See the Expoſition upon Magna Carta c.29. & 30. in the ſecond part of the Inſtit.

[c] For the word Monopoly, dicitur, ἀπὸ τοῦ μόνος, i. ſolo, καὶ πωλέομαι, i. vendere, quod eſt, cum unus ſolus aliquod genus mercaturæ univerſum vendit, ut ſolus vendat, pretium ad ſuum libitum ſtatuens: hereof you may read more at large in that caſe. And the law of the Realm in this point is grounded upon the law of God, which ſaith. Non accipies loco pignoris inferiorem & ſuperiorem molam, quia animam ſuam appoſuit tibi. Thou ſhalt not take the nether or upper milſtone to pledge, for he taketh a mans life to pledge: Whereby it appeareth that a mans trade is accounted his life, becauſe it maintaineth his life; and therefore the Monopoliſt that taketh away a mans trade, taketh away his life, and therefore is ſo much the more odious, becauſe he is vir ſanguinis. Againſt theſe Inventers and Propounders of evill things, the holy ghoſt hath ſpoken, Inventores malorum, &c. digni ſunt morte.

c In the Exchequer. Trin.44 Eliz. Lib.11.f.84,85. le caſe de Monopoliſts.

Deut.ca.24.v.6.

Rom.1.30.

That Monopolies are againſt the ancient and Fundamentall laws of the Realm (as it is declared by this Act) and that the Monopoliſt was in times paſt, and is much more now puniſhable, for obtaining and procuring of them, we will demonſtrate it by reaſon, and prove it by authority.

Commercium jure gentium commune eſſe debet, & non in Monopolium & privatum paucorum quæſtum convertendum. Iniquum eſt alios permittere, alios inhibere mercaturam. 11 H.7.11. W.1.cap.27.

Whatſoever offence is contrary to the ancient and Fundamentall laws of the Realm, is puniſhable by law: but the uſe of a Monopoly is contrary to the ancient and Fundamentall laws of the Realm, therefore the uſe of a Monopoly is puniſhable by law.

That offence which is contrary to the ancient and Fundamentall laws is malum in ſe. The Minor is proved by this declaration in Parliament.

The liberty that the ſubject hath to goe to any Clerk in the Kings Court cannot be reſtrained but by Parliament.

In 50 E.3. John Peachie of London was ſeverely puniſhed for procuring a licence under the Great Seal, that he only might ſell ſweet wines in London. Rot.Par.50 E.3. nu.33.

See in the Preambles of 9 E.3. cap.1, 25 E.3. cap.2. 27 E.3. & 28 E.3. Stat. Stap. 2 R.2. ca.1. See the ſtatute of Magna Carr. ca.3. 31 E.3. cap.10. 7 H.4.cap.9. and 12 H.7. ca.6. 1 & 2 Ph.& Mar.ca.14. Rot. Parl. 1 R.2.nu.29. 4 R.2 nu.39. 5 R.2.nu.89. Forteſcue cap.35, 36. One of the Articles wherewith William de la Pool Duke of Suffolk was charged, was for procuring of divers liberties in derogation of the Common law, and hindrance of Juſtice: Note this is an offence puniſhable. Rot. Parl. 28 H.6.nu.30.

Mich. 2 & 3 El. Dier Manuſcript not printed.

King Philip and Queen Mary by their Letters Patents granted to the Maior, Bailifs & Burgeſſes of Southampton & their ſucceſſors, (for that King Philip firſt landed there) that no wines called Palmſies, brought into this Realm from the parts beyond the ſeas by any Liege man or Alien, ſhould be diſcharged or landed in any other place of the Realm, but only at the ſaid town & port of Southampton, with a prohibition, that no perſon or perſons ſhall doe otherwiſe, upon pain to pay treble cuſtome: And it was reſolved by all the Judges of England that this grant made in reſtraint of the landing of the ſame wines was againſt the laws and ſtatutes of this Realm, viz. Magna Carta, 29, 30. 9 E. 3. cap. 1. 14 E. 3. 25 E. 3. ca. 2. 27. & 28 E. 3. Statute of the Staple. 2 R. 2. cap. 1. and others: and alſo that the aſſeſſment of treble cuſtome was againſt law, and meerly void. And after at the Parliament holden in Anno 5 Eliz. the Patent, as to Aliens, was by a private act confirmed by Parliament, and not for Engliſh.

Stat. de 5 Eliz.

Trin. 41 Eliz. Coram Rege, Rot. 92. Int. Davenant & Hurdys in treſpaſſe. Trin. 44 Eliz. in Lib. 11. fo. 84, 85. &c. Edward Darcies caſe. Hil. 7 Jacobi in Lib. 8. fo. 121, 122. &c. the caſe of the city of London.

The judgement in the ſaid caſe of Monopolies cited before, Trin. 44 Eliz. was the principall motive of the publiſhing of the Kings Book mentioned in the Preamble of this Act, and that Book was a great motive of obtaining the royall aſſent to this Act of Parliament, whereof we are now to ſpeak. This Act moved from the houſe of Commons: the Act is long and in print, and need not here to be rehearſed: yet will we peruſe and explain the words in the ſeverall branches of the Act.

¶ By his Grant, Commiſsion, or otherwiſe.] Theſe words [or otherwiſe] are of a large extent, and are well warranted by this Act, the words whereof extend not only to all Proclamations, Inhibitions, Reſtraints and warrants of aſſiſtance of the King, but all Inhibitions, Reſtraints and warrants of aſſiſtance of all or any of the Privy Councell or any other: and all other matters or things whatſoever either of the King, or of all or any of his Privy Councell to the inſtituting, erecting, ſtrengthening, furthering, or countenancing of the ſole buying, ſelling, &c. or any of them, are declared to be altogether contrary to the laws of this Realm, &c. ut in ſtatuto. This Act herein, and in the reſidue thereof, is forcibly and vehemently penned for the ſuppreſſion of all Monopolies: for Monopolies in times paſt were ever without law, but never without friends.

¶ Sole.] This word [ſole] is to be applied to Five ſeverall things, viz. buying, ſelling, making, working, and uſing; four of which are ſpeciall, and the laſt, viz. (ſole uſing) is ſo generall, as no Monopoly can be raiſed, but ſhall be within the reach of this ſtatute, and yet for more ſurety theſe words [or of any other Monopolies] are added: and by reaſon of theſe words [ſole uſing] divers proviſions are made by this Act, as hereafter ſhall appear.

¶ Of any thing.] As the words before were generall, ſo theſe words [of any thing] are of a large extent. Res enim generalem habet ſignificationem, quia tam corporea, quam incorporea, cujuſcunque ſunt generis, naturæ, ſive ſpeciei, comprehendit: and this word cauſeth ſome exceptions hereafter to be made, whereof we ſhall ſpeak in their proper place.

¶ Whereby any perſon or perſons, &c.] For this ſee the ſtatute of Magna Carta, ubi ſupra: and this clauſe is impliedly warranted by theſe words [or of any other Monopolies] in the firſt clauſe of the Purvien.

¶ Shall be for ever hereafter examined, heard, tried, and determined by and according to the Common laws of this Realm, and not otherwiſe.] This Act having declared all Monopolies, &c.

&c. to be void by the Common law, hath provided by this clauſe, that they ſhall be examined, heard, tried, and determined in the Courts of the Common law according to the Common law, and not at the Councell Table, Star-chamber, Chancery, Exchequer chamber, or any other Court of like nature, but only according to the Common laws of this Realm, with words negative, and not otherwiſe: For ſuch boldneſſe the Monopoliſts took, that often at the Councell Table, Star-chamber, Chancery, and Exchequer chamber, petitions, informations and bils were preferred in the Star-chamber, &c. pretending a contempt for not obeying the commandements and clauſes of the ſaid grants of Monopolies, and of the proclamations, &c. concerning the ſame: for the preventing of which miſchief this branch was added.

¶ That all perſon and perſons, bodies politique, and corporate whatſoever, which now are, or hereafter ſhall be, ſhall ſtand, and be diſabled, and uncapable, &c.] This branch for further extirpation of all Monopolies, diſableth all men, &c. to have, that is, to take any Monopoly, or to uſe, exerciſe, or put in ure any Monopoly, &c. whereby the wiſh and deſire of the Poet is granted.

Funditus extirpa Monopolas & Nomopolas;
Hic labor, hoc opus eſt; Hercule major eris.
Paucorum nocuit ſcelerata licentia multis,
Argento mutat dum Monopola piper.

¶ If any perſon or perſons after the end of forty dayes next after the end of this preſent Seſsion of Parliament ſhal be hindred, grieved, diſturbed, or diſquieted, &c.

By this branch Six things are provided and enacted. 1. Remedy is given to the party grieved at the Common law by action or actions to be grounded upon this ſtatute. 2. This remedy may be had in the Court of the Kings Bench, Common Pleas, and Exchequer, or any of them, at the election of the party grieved. 3. The party grieved ſhall recover treble damages, and double coſts. 4. No eſſoin, protection, wager of law, aid prayer, priviledge, injunction, or order of reſtraint to be allowed in any ſuch action. By (aid prayer) is intended as well the Writ de domino rege inconſulto, as the uſuall form of aid prayer, for both are to one end, and (order of reſtraint) was added, for the Councell Table, Star-chamber, Chancery, Exchequer Chamber, and the like.

¶ 5. If any perſon or perſons ſhall after notice given, &c. cauſe or procure any ſuch action to be ſtayed or delayed before judgement, by colour or means of any order, warrant, power or authority, ſave onely of the Court wherein ſuch action ſhall be brought and depending, the perſon or perſons ſo offending ſhall incur the danger of Premunire, &c.

This clauſe extends to the Priby Councell, Star-chamber, Chancery, Exchequer Chamber, and the like, and likewiſe to thoſe that ſhall procure any warrant, &c. from the King, &c. and ſo it was reſolved by a Committee of both Houſes before this Bill paſſed; but it extendeth not to the Judges of the Court before whom any ſuch action ſhall be brought, for before judgements, dayes muſt be given by orders of Court, &c.

¶ 6. Or after judgement had upon ſuch action ſhall cauſe or procure execution of or upon any ſuch judgement, to be ſtayed by colour or means of any order, warrant, power or authority, ſave only by writ of Error and Attaint, the perſon or perſons ſo offending ſhall incur the danger of Premunire, &c.

This clauſe is more generall then the former, being the fifth clauſe, for this extendeth alſo to the Judges of the Court where the action is brought or depending, if any ſtay or delay be uſed by them after judgement, and ſo it was reſolved as is aforeſaid.

There be in this Act concerning Monopolies or sole buying, &c. many Provisoes. The first is, That this Act shall not extend to any Letters Patents or grants of privilege heretofore made of the sole working or making of any manner of new manufacture: but that new manufacture must have seven properties. First, it must be for twenty one years or under. Secondly, it must be granted to the first and true inventer. Thirdly, it must be of such manufactures, which any other at the making of such Letters Patents did not use: for albeit it were newly invented, yet if any other did use it at the making of the Letters Patents, or grant of the privilege, it is declared and enacted to be void by this Act. Fourthly, the privilege must not be contrary to law: such a privilege, as is consonant to law, must be substantially and essentially newly invented, but if the substance was in esse before, and a new addition thereunto, though that addition make the former more profitable, yet is it not a new manufacture in law; and so was it resolved in the Exchequer Chamber Pasch. 15 Eliz. in Bircots case for a privilege concerning the preparing and melting, &c. of lead ore: for there it was said, that that was to put but a new button to an old coat: and it is much easier to adde then to invent. And there it was also resolved, that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited. Fifthly, nor mischievous to the State by raising of prices of commodities at home. In every such new manufacture that deserves a privilege, there must be Urgens necessitas, and evidens utilitas. Sixthly, nor to the hurt of trade. This is very materiall and evident. Seventhly, nor generally inconvenient. There was a new invention found out heretofore, that Bonnets and Caps might be thickned in a fulling mill, by which means more might be thickned and fulled in one day then by the labours of fourscore men, who got their livings by it. It was ordained that Bonnets and Caps should be thickned and fulled by the strength of men, and not in a fulling mill, for it was holden inconvenient to turn so many labouring men to idleneſſe. If any of these seven qualities fail, the privilege is declared and enacted to be void by this Act: and yet this Act, if they have all these properties, set them in no better case, then they were before this Act.

Concerning new manufactures and heretofore granted, &c.

Pasch. 15 Eliz. in the Exchequer Chamber Bircots case.

Rot. Parl. 21 E. 4. nu. 29.
22 E. 4. ca. 5.
7 E. 6. ca. 6.
1 Jacobi ca. 5.

The second Proviso concerneth the privilege of new manufactures hereafter to be granted: and this also must have seven properties, first it must be for the tearm of fourteen years or under: the other six properties must be such as are aforesaid, and yet this Act maketh them no better, then they should have been, if this Act had never been made, but only except and exempt them out of the Purview, and penalty of this Law.

Concerning new manufactures hereafter to be granted, &c.

The cause wherefore the privileges of new manufactures either before this Act granted, or which after this Act should be granted, having these seven properties, were not declared to be good, was, for that the reason wherefore such a privilege is good in law is, because the inventer bringeth to & for the Common wealth a new manufacture by his invention, cost and charges, and therefore it is reason, that he should have a privilege for his reward (and the incouragement of others in the like) for a convenient time: but it was thought that the times limited by this Act were too long for the private, before the Common wealth should be partaker thereof, and such as served such privileged persons by the space of seven years in making or working of the new manufacture (which is the time limited by law of Apprenticehood) must be Apprentices or servants still during the residue of the privilege, by means whereof such numbers of men would not apply themselves thereunto, as should be requisite for the Common wealth, after the privilege ended. And this was the true cause wherefore both for the time passed, and for the time come, they were left of such force, as they were before the making of this Act.

The third proviso is, That this Act shal not extend or be prejudicial to any grant or privilege, power or authority heretofore made, granted, allowed, or confirmed by any Act of Parliament now in force, so long as the same shall so continue in force. This was added for that the City of London & other Cities & Boroughs,

& &c.

&c. have ſome priviledges for buying, ſelling, &c. by Acts of Parliament. For example, The ſtatute of 1 & 2 Ph. & Mar. giveth a Priviledge to Cities, Boroughs, Towns corporate, & Market Towns, for the ſale by retale of certain wares and merchandizes, and ſome other Acts of Parliament in like caſe: all which do prove, that ſuch priviledges could not be granted by Letters patents. But ſpecially this clauſe was added in reſpect of the generality of theſe words [ſole uſing.] 1 & 2 Ph. & Mar. cap. 7.

The fourth Proviſo. Provided alſo, and it is hereby further intended, declared, and inacted, that this Act, &c. ſhall not in any wiſe extend, or be prejudiciall unto the City of London, &c.

By this Proviſo, not only the Grants, Charters, and Letters Patents to any City or Towne Corporate, &c. but alſo the cuſtomes uſed within the ſame, are excepted out of this Act: which ſeemeth to be more then need, becauſe the firſt clauſe of the Purvien of this Act doth extend but to Commiſſions, Grants, Licenſes, Charters, and Letters Patents.

The fifth Proviſo doth except out of the Purvien and penalty of this ſtatute four things, but leaveth them of the like force and effect, and no other as this Act had never been made. Firſt, the priviledge concerning printing made, or hereafter to be made. Secondly, Commiſſions, Grants, and Letters Patents made or hereafter to be made for or concerning the digging, making, or compounding of Salt-peter or Gunpowder. Thirdly, or the caſting or making of Ordnance, or ſhot for Ordnance. Fourthly, Grants and Letters patents heretofore made, or hereafter to be made of any Office or Offices heretofore erected, made, or ordained, and now in being, and put in execution, (other then ſuch Offices as have been decried by any his Majeſties Proclamations.) So as to the thing by this Branch excepted, Four things are required. Firſt that it be an Office. This extendeth only to lawfull Offices for divers cauſes. 1. It was neceſſary to except lawfull Offices in reſpect of theſe words [ſole uſing.] 2. Offices are duties, ſo called, to put the Officer in minde of his duty. 3. That which is voide and againſt Law, is no duty, unleſſe it be not to uſe them. 4. Such as are erected againſt Law, are Monopolies and Oppreſſions of the people, and no Offices. 5. In Acts of Parliament lawfull Offices are intended, as in like caſes hath been often adjudged: therefore unlawfull Offices are all taken away by this Act, and lawfull Offices remain and continue. Lit. Sect. 731. Pl. com. 246. b. 11 H. 4. 80. 4 E. 4. 31. pl. 1.

Secondly, that it be an Office heretofore erected. By this Act the erection of all new Offices, which were not erected before this Act, are wholly taken away.

Thirdly, that it be now in being, and put in execution. Though the Office were erected before this Act, yet if it were not in being and put in execution the 19 day of February in the 21 year of the reigne of King James (at what time this Parliament begun) it is cleerly taken away by this Act.

Fourthly, that it be ſuch an Office, as hath not been decried (for ſo is the Record of Parliament, and not [decreed] as it is in the printed book) by any of his Majeſties Proclamations: for all ſuch Offices as be decried, that is, either forbidden, or prohibited by any of his Majeſties Proclamations, or where the party grieved is left to his remedy at the Common law by any Proclamation, they be alſo decried; for being contrary to the lawes of this Realme, as it is declared and enacted by this Act, they are alſo decried with a witneſſe, and can never be granted hereafter. See the Proclamation bearing date 10 July, An. 19 Jac. regis, and another Proclamation bearing date, 20 Martii An. 19 Ja. Regis.

The ſixt Proviſo concerning the making of Allom, or Allome-Pines, needed not, for they belong to the Subject in whoſe ground ſoever the Mare is: & therefore any priviledge thereof cannot be granted, but in the Kings owne ground.

The ſixth Proviſo concerns the Hoſtmen of Newcaſtle, &c. This Clauſe was inſerted in reſpect of theſe words [ſole uſing.]

The reſt of the Proviſoes concerne particular perſons, and do exempt and except certains ſuppoſed priviledges out of the Purvien and penalty of this Law, but leaveth them of like force and effect, as they were before the making of it.

But it is to be obſerved, that all the Proviſoes after the Sixth, extend only to the ſuppoſed priviledges therein particularly mentioned already granted, and not to any to be granted hereafter.

CAP.

CAP. LXXXVI.

Againſt thoſe that obtaine power to diſpenſe with penall lawes, and the forfeitures thereof.

The ſtatute of 21 Jac. cap. 3.

IT appeareth by the Preamble of this Act, that all Grants of the benefit of any penall law, or of power to diſpence with the law, or to compound for the forfeiture, are contrary to the ancient fundamentall lawes of this Realm.

In Exilio Hugonis.

It was one of the Articles wherefore the Spencers in the reigne of King E. 2. were ſentenced, that they procured the King to make many Diſpenſations. Per lour malveis counſell deſeaſant ceo q̄ le Roy ad grant p Parliament p bone advice.

Rot. Parliam. 50 E. 3. nu. 17. & 28.

In 50 E. 3. Richard Lions a Merchant of London, and the Lo. Latimer, were ſeverally ſentenced in Parliament for procuring of Licenſes and Diſpenſations to tranſport Wools, &c.

See 28 H. 6. nu. 30. before.

The Purvien of the Act of 21 Ja. cap. 3.

IT is declared and enacted, that all Commiſſions, Grants, Licenſes, Charters, and Letters patents, heretofore made or granted, to any perſon or perſons, bodies politick, or corporate, of any power, liberty, or faculty, to diſpenſe with any others, or to give licenſe or toleration to doe, uſe, or exerciſe any thing againſt the tenure or purport of any Law or Statute, or to give, or make any warrant for any ſuch diſpenſation, licenſe or toleration to be had, or made, or to agree, or compound with any others for any penaltie or forfeitures limited by any ſtatute, or of any grant or promiſe of the benefit, profit, or commoditie of any forfeiture, penalty or ſumme of money, that is or ſhall be due by any Statute before judgement thereupon had, and all Proclamations, Inhibitions, Reſtraints, Warrants of aſſiſtance, and all other matters and things whatſoever, any way tending to the inſtituting, erecting, ſtrengthening, furthering, or countenancing of the ſame or any of them, are altogether contrary to the Lawes of this Realme, in no wiſe to be put in execution.

The offence deſcribed.

And ſhall be for ever hereafter examined heard, tried, and determined, by and according to the Common Lawes of this Realme; and not otherwiſe &c.

Provided alſo, that this Act ſhall not extend to any Warrant or Privie Seale made or directed, or to be made or directed by his Majeſtie, his Heirs or Succeſſors, to the Juſtices of the Courts of Kings Bench, Common Pleas, Barons of the Exchequer, &c. and other Iuſtices for the time being, having power to heare and determine, &c. to compound, &c.

This Act moved from the Houſe of Commons. Now let us peruſe, firſt, the words of the Purvien of this Act, and ſecondly, of this Proviſo.

In and by the Purvien Five things are declared & enacted to be void, and contrary to the ancient fundamentall lawes of this Realme. Firſt, all Commiſſions, Licenſes, Charters, and Letters patents of any power liberty or faculty, or to give licenſe or toleration to do, uſe, or exerciſe any thing againſt any Law or Statute. The reaſon hereof is notably expreſſed by the reſolution of all the Judges of England, in the caſe of penall ſtatutes, whereunto we refer you.

Hil 2 Jac. lib. 7. fo. 36. b. the caſe of penal ſtatutes.

¶ 2 Or

¶ 2 Or to give or make any warrant for any ſuch diſpenſation, licenſe, or toleration.] For this branch alſo, ſee the ſaid caſe of penall Statutes, ut ſupra.

¶ 3 Or to agree or compound with any others for any penalty or forfeitures limited by any ſtatute.] By this branch, all Commiſſions to agree or compound with any others for any penalty or forfeiture limited by any ſtatute, are declared to be void, and againſt the ancient fundamentall lawes of the Realme. The great inconvenience hereof appeared in the proceedings of Empſon and Dudley, in the reigne of King H. 7. who had the Office of Maſters of the forfeitures: and by colour of their Commiſſion and Office, did moſt intolerably and unlawfully oppreſſe, burden, and depauperate the Subjects. Let them which follow their ſteps be afraid of their fearfull end: Qui eorum veſtigia ſequuntur, eorum exitus perhorreſcant. The like oppreſſion was uſed by certain Commiſſioners for compoſitions to be made for offences committed againſt penall ſtatutes, in the reigne of Queen Mary. This Branch hath ſtrucken at the root, and prevented this miſchief for ever hereafter.

¶ 4 Or of any grant or promiſe of the benefit, profit, or commodity of any forfeiture, penalty, or ſum of money, that is or ſhall be due by any ſtatute before judgement thereupon had.] This branch declareth not only the grant to be void, and againſt the lawes of this Realme, (for the which, ſee the reſolution of all the Judges in the ſaid caſe of penall ſtatutes, ubi ſupra,) but the promiſe thereof alſo. And the reaſon that the Judges yeeld there, is notable, in theſe words, For that in our experience it maketh the more violent and undue proceeding againſt the Subject to the ſcandall of Juſtice, and offence of many. So as the grant or promiſe of any forfeiture before judgement, is both againſt law, and inconvenient. And if it be ſo in caſe of a forfeiture or penalty; much more in caſe of life and death, for the forfeiture, &c. of any man to be begged, before he be duly and lawfully attainted. For, as the Judges ſay, there is the more violent and undue proceeding againſt the ſubject to the ſcandall of juſtice, and the offence of many: and therefore ſuch beggers are offenders worthy of ſevere puniſhment.

Againſt theſe hunters for blood the Prophet ſpeaketh thus, Periit ſanctus de terra, & rectus in hominibus non eſt, omnes in ſanguine inſidiantur, vir fratrem ſuum ad mortem venatur. There is not a godly man upon earth, there is not one righteous amongſt men, they all lye in wait for blood, and every man hunteth his brother to death. Micah 7. 2.

¶ 5 And all Proclamations, Inhibitions, Reſtraints, Warrants of aſſiſtance, and all other matters or things any way tending to the inſtituting, erecting, ſtrengthening, &c.] This is the like clauſe, and is ſo to be expounded, as before hath been in the Chapter of Monopolies.

Concerning the ſaid Proviſo, the Judges before whom the cauſe dependeth, and that have power to hear and determine the ſame, who are preſumed to be indifferent between the King and the Subject, may by Warrant or Privie Seale, &c. compound, &c. for the King only, after plea pleaded by the defendant.

There is another Proviſo concerning Letters Patents, or Commiſſions for licenſing of keeping of any Tavern, or ſelling, &c. of Wines, &c. or for the making of any compoſitions for ſuch licenſes, ſo as the benefit of ſuch compoſitions be reſerved, and applyed to or for the uſe of his Majeſtie, his Heirs or Succeſſors and not for the private uſe of any other perſon or perſons.

The report of the ſaid caſe of penall ſtatutes was a principall motive of the Kings Book, mentioned in the preamble of this Act: and that Book amongſt other juſt and weighty cauſes moved the King to give his Royall aſſent to this Act of Parliament, &c. whereof we have ſpoken.

CAP.

CAP. LXXXVII.

Againſt Concealours (*turbidum hominum genus*) and all pretences of Concealements vvhatſoever.

Statut. de Anno 21 Jac. cap. 2.

THat the Kings Majeſtie, his Heirs, or Succeſſors, ſhall not at any time hereafter ſue, impeach, queſtion, or implead any perſon or perſons, bodies politick, or corporate, &c.

The Act is long, and need not here be rehearſed. Yet will we peruſe and explaine the ſeverall branches and parts of the Act.

Before the making of this ſtatute, in reſpect of that ancient prerogative of the Crowne, that nullum tempus occurrit Regi, the titles of the King were not reſtrained to any limitation of time; for that no ſtatute of limitation that ever was made, did ever limit the title of the King to any Mannors, Lands, Tenements, or Hereditaments, to any certaine time. And where many Records and other Muniments, making good the eſtate and intereſt of the Subject, either by abuſe or negligence of Officers by devouring time were not to be found; by means whereof, certaine indigne and indigent perſons prying into many ancient titles of the Crown, and into ſome of later time concerning the poſſeſſions of divers and ſundry Biſhopricks, Dean and Chapters, and the late Monaſteries, Chauntries, &c. of perſons attainted, and the like, have paſſed ſurreptitiouſly in Letters Patents, oftentimes under obſcure and generall words, the Mannors, Lands, Tenements, and Hereditaments of long time enjoyed by the Subjects of this Realm, as well Eccleſiaſticall as Temporall: Now to limit the Crown to ſome certaine time, to the end, that all the Subjects of this Realme, their Heirs and Succeſſors, may quietly have, hold, and enjoy all and ſingular Mannors, Lands, Tenements, and Hereditaments, which they, their anceſtors, or predeceſſors, or any other, by, from, or under whom they claime, have of long time enjoyed; this Act was made and moved from the Houſe of Commons, the body whereof conſiſteth of three parts. Firſt, that part which above is in part rehearſed, conſiſteth on Three Branches.

The firſt part.

Firſt, That the King, his Heirs or Succeſſors, ſhall not at any time hereafter, ſue, impeach, queſtion, or implead any perſon or perſons, bodies politick or corporate, for, or in any wiſe concerning any Mannors, &c. *Secondly*, Or for or concerning the revenues, iſſues, or profits thereof. *Thirdly*, Or make any title, claime, challenge, or demand, &c.

This part is excluſive and negative: and herein ſix things are to be obſerved.

1. This clauſe extendeth to all maner of ſuits, &c. either in Law, or in Equity. 2. To all manner of Courts whatſoever. 3. It extendeth not only to all manner of ſuits, but to all impeachments, queſtionings, impleadings, making of title, claimes, challenges, or demands. 4. Under theſe words [right, and title] not only bare rights and titles are comprehended, but reall eſtates alſo. 5. Not only ſuits, &c. for or concerning any Mannors, &c. but for or concerning the revenues, iſſues, or profits, &c. and this extendeth to the ancient demeans of the Crowne, which are mentioned to be reſtrained by an Act of 11 H. 4. 6. So as all Writs of Scire fac' or other Proces upon any Record; all informations of intruſion, or charging any man as Bayliffe: all finding of Offices, either of intitling the King, or of information, are reſtrained, not only within theſe words [impeach or queſtion] but alſo within theſe words [or make any title, claime, challenge, or demand] which are large and beneficiall words, and all other ſuits, &c. of

Rot. Par. 11 H 4. nu. 23. not imprinted.

what

what kind or nature ſoever. But this Negative clauſe muſt have Four incidents. 1. The Kings right and title muſt accrew unto him above threeſcore years paſt before the Nineteenth day of February, in the 21 year of King James, which was the day of the beginning of this Parliament. The reaſon hereof was, that if any title of eſcheat, forfeiture, &c. accrewed within threeſcore years, then it ſhould be out of this Act: for generally the time of limitation to bar the King was threeſcore years, but ſuch right or title muſt now be in eſſe. 2. Unleſſe the King or his Progenitors, &c. or any, under whom he or they claim, have been anſwered by force and vertue of any ſuch right or title to the ſame, the rents, revenues, iſſues, or profits thereof within threeſcore years, &c. In this branch theſe words [by force and vertue of any ſuch right or title] were materially added, for otherwiſe if the King had been anſwered the rents, revenues, &c. by reaſon or pretext of Wardſhip, primer ſeiſon, extent, or the like, it might have made a doubt whether ſuch an anſwering of the revenues, &c. had been within this Act; which doubt is cleared, that it muſt be by force or vertue of any ſuch right or title, whereby the King impeacheth the ſtate of the ſubject. 3. Or that the ſame have been duly in charge to his Majeſty, or to the late Queen Elizabeth within the ſpace of threeſcore years. Duly in charge in judgement of law, is the roll of the pipe: for although a note before the Auditor or any other may be a mean to bring it in queſtion, and to be put in charge, yet that is not in judgement of law ſaid to be duly in charge, unleſſe it be in charge in the pipe. 4. Or have ſtood in ſuper of record within the ſaid ſpace of threeſcore years. It cannot ſtand in ſuper, unleſſe the thing in queſtion were before duly in charge.

But there is a good Proviſo added towards the end of this Act, viz. that no putting in charge, or ſuper, or anſwering of the farm rents, revenues, or profits, &c. in four caſes ſhall be within this Act, viz. By force, colour or pretext of any Letters Patents of concealments: They were called Letters Patents of concealments, becauſe either they had a clauſe before the habendum: quæ quidem maneria nuper fuerunt à nobis concelata, ſubtracta, vel injuſte detenta, or to the like effect; or elſe a Proviſo after the habendum to the like effect. Letters Patents of concealment were granted in Queen Maries time, and the firſt that I find, were granted to Sir George Howard: and in all ſucceeding Acts of Parliament of confirmation of Letters Patents, Letters Patents of concealments are excepted.

2. Or defective title. By Letters Patents paſſed by the warrant of certain Commiſſioners under the Great Seal for compoſitions of defective titles, pretending the ſame to be for the Kings benefit, and ſafety of the ſubject, in which Letters Patents no words of concealment, &c. are mentioned, but yet upon the matter, they were ſuppoſed to be concealed, &c. from the Crown.

3. Or of lands tenements or hereditaments out of charge. This was a new device to have a Certificate, that they were not in charge, and then to take a grant from the King, for a very ſmall compoſition, &c. And theſe were but inventions and ſubtill devices to deceive the King, to rob him of his tenures, and to the infinite veration and trouble of the ſubject, all which miſchiefs are now remedied by this Act.

4. Or by force, colour or pretext of any Commiſſion or other authority to finde out concealments, defective titles, or land, &c. out of charge. This was a neceſſary clauſe to be added, for of this kind there were infinite numbers.

Out of this firſt part all Liberties and Franchiſes be excepted.

¶ And that every perſon and perſons, bodies politique and corporate, their heirs and ſucceſſors, and all claiming from, by, or under them, or any of them, for and according to their ſeverall eſtates and intereſts, which they have, or claim to have in the ſame reſpectively, ſhal hereafter quietly and freely have, hold and enjoy againſt his Majeſty, his heirs and ſucceſſors, &c. The 2. part.

This is the ſecond part of the body of the Act, and as the firſt part is Negative and excluſive of the right and title of the King, ſo this part is Affirmative, and eſtabliſhing the eſtate of the ſubject.

The miſchief before this ſtatute was in two ſorts, viz. either when the King had any eſtate veſted, or continued in him; or where the King had but a bare right. For example, the Kings tenant ſeiſed of lands, &c. in fee is attainted of felony, and dieth, the King hath a reall eſtate in him: but if before the felony the Kings tenant were diſſeiſed, and after is attainted, and dieth, now hath the King but a bare right. In both theſe caſes, & ſic in ſimilibus, the ſubject is provided for by this Act, both by the firſt part, and by this alſo: for where in this part it is ſaid, according to their and every of their ſeverall eſtates and intereſts which they have or claim. If they have an eſtate, and the King but a bare right or title, then are they within theſe words [which they have] and if the King hath a reall eſtate in him, then are they within theſe words [or claim] ſo as the remedy is applied to both the miſchiefs. Again, the words in this part are further, have held, or enjoyed, That is, where the ſubject hath an eſtate, and the King but a bare right or title.

¶ Or taken the rents, iſſues, revenues, or profits thereof.] Theſe words extend to all caſes where the reall eſtate is in the King: Hereby is underſtood the actuall taking of the rents, iſſues, revenues or profits by one that claims an intereſt in the land: for albeit the King may in law charge him as Bailif, yet without queſtion, de facto, he did take the rents, iſſues, revenues and profits, and that ſufficeth to anſwer the letter and meaning of this Act.

Moreover, the words of this part are, [Againſt him, his heirs or ſucceſſors] ſo as admit in the caſe put before, the Kings tenant being diſſeiſed, as is aforeſaid, before his attainder of felony, that that diſſeiſor had been diſſeiſed, or had mortgaged the land before this ſtatute, this Act in this caſe barreth the King of his right & title, & to that end worketh upon the eſtate of the Diſſeiſor or Mortgagee, but yet the firſt Diſſeiſor or the Mortgagee for the condition performed or broken may reenter; for the words of this part be [againſt the King, his heirs and ſucceſſors] ſo as the bar is only againſt them: and every ſubject ſhall take benefit of this Act, for the Kings right and title is thereby utterly barred: and there is a ſaving hereafter in this Act to all perſons, &c. other then the King, &c. all ſuch right, &c. as they ought to have had before this Act.

This part extendeth not to liberties and franchiſes.

Now followeth the third part of the Purvien of this Act.

The 3. part. And furthermore, that every perſon and perſons, bodies politique and corporate, their heirs and ſucceſſors, &c. ſhall quietly and freely have, hold, and enjoy all ſuch Mannors, &c. as they now have, claim, and enjoy, &c. againſt all and every perſon and perſons, their heirs and aſſigns having, claiming, or pretending to have any eſtate, right, title, intereſt, claim or demand whatſoever, &c. by reaſon, or colour of any Letters Patents, or grants upon ſuggeſtion of Concealment, or wrongfull detaining, or not being in charge, or defective titles, or by, from, or under any Patentees, &c. of or for which Mannors, &c. no verdict, &c.

This part ſecures the ſubject againſt the ſubject, viz. againſt Patentees and Grantees of concealments, defective titles, or lands not in charge, and all claiming under them. A beneficiall Law both for the Church and Common wealth, in reſpect of the multitude of Letters Patents and Grants of theſe natures and qualities, and many of them of large extents and in generall words, and had paſſed through the hands of many indigent and needy perſons, &c.

This part extendeth to Liberties and Franchiſes, which the Former two parts did not.

The

The two firſt Proviſoes are plain, and in effect are included in the body of the Act. The ſecond Proviſo was neceſſary to preſerve tenures: the ſaving needeth no explanation. The third Proviſo is particular and evident. The fourth Proviſo, Provided alſo, and be it enacted, that where any fee farm rent, &c. This was added for the preſerving of the Kings fee farms and rents out of ſuch Mannors, &c. which are eſtabliſhed and made ſure by this Act. For example: King E. 6. did grant the Mannor of D. which came to him by the ſtatute of Chanteries, to I. S. and his heirs, reſerving a fee farm, or any other rent, which grant for ſome imperfection was inſufficient in law to paſſe the ſaid Mannor, and yet is eſtabliſhed and made ſure by this Act. This Proviſo maketh good the fee farm or rent to the King, if he hath been anſwered the ſame by the greater part of ſirty years laſt paſt.

The laſt Proviſo is particular and evident.

Of the benefit of this Act the poor doe participate, as well as the rich, for hereby (amongſt other things) above an hundred Lay Hoſpitals having had Prieſts within them in thoſe days to pray & ſing for ſouls, &c. (if need were) are eſtabliſhed againſt all vexations, and pretences of concealments.

See an excellent Act made againſt theſe Harpyes or Heluones, that under obſcure words endeavoured ſurreptitiouſly in a Patent of concealment to have ſwallowed up the greateſt part of the poſſeſſions of that ancient and famous Biſhoprick of Norwich, which by the induſtry and proſecution of the then Attorney generall was overthrown, and yet for more ſurety in a matter of ſo great weight preferred a Bill in Parliament for eſtabliſhing of the Biſhoprick, which in the end paſſed as a law, Anno 39 El. ubi ſupra.

See 39 El. ca. 22. which is worthy to be read. See this caſe at large in the 4. pt of the Inſtitutes cap. Conſiſtory Courts, &c.

Triſtius haud illis monſtrum, nec ſævior ulla
Peſtis & ira Dei ſtygiis ſeſe extulit undis:
Virginei volucrum vultus, fœdiſſima ventris
Proluvies, uncæque manus, & pallida ſemper
Ora fame.

CAP. LXXXVIII.

Againſt Vexatious Relators, Informers, and Promooters upon Penall Statutes.

THat all offences hereafter to be committed againſt any Penall Statute, for which any common Informer or Promooter may lawfully ground any popular action, bill, plaint, ſuit or information, &c. ſhall be commenced, ſued, proſecuted, &c. before the Juſtices of Aſſiſe, Juſtices of Niſi prius, &c. in the Counties where the offences were committed, and not elſewhere.

Statutum de 21 Jac. Reg. c. 4.

Whereas a good and profitable law was made in the 18 year of Queen El. for the eaſe and quiet of the ſubject, and for the regulating of Informers upon penall ſtatutes, inflicting corporall puniſhments in certain caſes upon them. And whereas two other good laws were made for the ſame ends, the one in the 28 year, and the other in the 31 year of the ſaid late Queens reign, which yet ſtand and remain in force: yet theſe Acts did not meet with all the miſchiefs and grievances offered to the ſubject by the Relators, Informers and Promooters, (turbidum hominum genus) but theſe four miſchiefs and grievances remained ſtill.

18 El. ca. 5.

28 El. ca. 5.
31 El. ca. 10.

First, many penall laws obsolete, and in time grown apparently impossible, or inconvenient to be performed, remained as snares, whereupon the Relator, Informer or Promooter did ver and intangle the subject; Such as were the statutes made anno 37 E.3.cap.3. concerning the prices of Poultry, and 34 E.3. ca.20. concerning transportation of Corn, and 3 E. 4. cap. 2. concerning Corn not to be brought into the Realm, and 4 H.7.ca.9. concerning the prices of Hats and Caps, and 14 R.2.cap.7. concerning the passing of Tyn out of the Realm, and 15 R.2. cap.8. concerning the carriage of Tyn to Calys, and 4 H.5. cap. 3. concerning making of Pattens of Asp, and 4 H.7.ca.8. concerning the prices of broadcloth, &c. and 11 H.7. cap. 2. concerning Vagabonds, unlawfull games, and Alehouses, &c. and one other statute in the 19 year of H.7. ca.12. concerning those matters, and 11 H.6. ca. 12. concerning Warchandlers, and the price of candles, and 34 H.8.cap.7. concerning the sale of Wines, and 28 H.8.cap.14. concerning the prices of Wines, and 27 H.8. Stat. de Monasteriis, concerning keeping of house and households upon scites of Monasteries, &c. and 4 H.7.cap.19. concerning houses of husbandry and tillage, and 7 H.8.ca 1. concerning letting down of towns, and 27 H.8. cap. 22. concerning decay of houses & Inclosures, and 5 E.6.ca.5. for the maintenance of Tillage, &c. and 5 Eliz.cap.2. for maintenance and increase of Tillage, and 14 R.2.ca.4. 8 H.6. ca.23. and 5 E.6. cap.7. concerning the buying of Wooll, woollen yarn, &c. and 33 H.8.cap.5. concerning the keeping of great horses, the statute of Winchest. in the time of E.1. concerning Harnesse and Arms, Artic. super Cart. ca.20. concerning making of Rings, Crosses, and Locks, and 37 E.3. cap.7. that makers of white vessell should not guild, and 2 H.5. ca.4. Stat.2. that Goldsmiths should not take more then forty six shillings eight pence for a pound of Troy silver guilt, and 2 H.6.ca.14. that no silver shall be bought for more then thirty shillings the pound of Troy, and 2 H.4.ca.6. against the bringing in of Coin of Flanders, Scotland, and other Forain Coin, and 13 R.2. ca.8. and 4 H.4. cap.25. concerning the prices of Hay and Oats sold by Hostlers, and 4 & 5 Ph. & Mar. ca.5. concerning the putting to sale of coloured cloth: and another part of the same statute concerning the mystery of making, weaving, or rowing of woollen cloth, &c. and 18 El.ca.16. for toleration of certain Clothiers to dwell out of towns corporate, and many other unnecessary statutes unfit for this time, about the number of threescore are repealed by an Act made at this Parliament in the 21 year of of the reign of King James, as by that Act appeareth: And many like Acts are not continued, as by the conference between that Act & other former Acts of continuance may appear: So as these snares that might have lien heavy upon the subject, by this and other former statutes either are repealed, or not continued.

13 E.1. Stat. de Winton.

The second mischief was, that common Informers, and many times the Kings Attorny drew all Informations for any offence, in any place within the Realm of England against any penall law to some of the Kings Courts at Westminster, to the intolerable charge, veration, and trouble of the subject; and it was feared that Westminster Hall would labour of an Apoplery by drawing up all suits unto it, as the naturall body doth tabescere, when the humours of the body are drawn up unto the head, which in the end (if it be not prevented) turneth to an Apoplery.

The third mischief was, that in Informations, &c. the offence supposed to be against the penall law, and to be committed in one County, was at the pleasure of the Informer, &c. alledged in any County where he would, where neither party nor witnesse was known, against the right institution of the law, that the Jury (for their better notice) should come de vicineto of the place where the fact was committed.

The fourth mischief was, that in divers cases the party Defendant in Informations or Actions upon the statute, were driven to plead specially, which was both chargeable and dangerous to him, if his plea were not both substantiall and formall also.

These three mischiefs last mentioned are expressly and absolutely provided for by

this Act, which moved from the Houſe of Commons. And ſo did the Act of continuing and reviving of divers ſtatutes, and repeale of divers others. 21 Jac.cap.28.

The firſt part of the Purview beginning thus. For remedy whereof be it enacted by the authority of this preſent Parliament, that all offences, &c. The firſt part of the Act.

This clauſe conſiſteth upon Three parts. Firſt, affirmative: and this is divided into two branches. 1. For the Informations, &c. It is enacted, that where a common Informer might before this Act have informed upon any penall ſtatute before Juſtices of Aſſiſe, Juſtices of Niſi prius, or Juſtices of Gaole-delivery, Juſtices of Oier and Terminer, or Juſtices of Peace in their generall or quarter Seſſions; there a common Informer may informe, &c. 2. Before what Judges; this Act appoints no new Judges, but ſuch as former penall lawes appointed, viz. the Juſtices before mentioned, or any of them according to the former Act.

The ſecond part is reſtrictive, reſtraining any Information, &c. to be commenced, ſued, &c. either by the Attorny Generall, or by any Officer, common Informer, or any other perſon whatſoever, in any of the Kings Courts at Weſtminſter. So as the Kings Bench, Star-chamber, Chancery, Common-pleas, Exchequer, or Exchequer-chamber, cannot receive or hold plea of any Information, &c. upon any penall ſtatute, either by the Kings Attorny, any common Informer, or any other perſon whatſoever: but the matter ſhall be heard and determined before ſuch Juſtices as are foreſaid in the proper County where the offence was committed.

The third part giveth the like Proces upon every popular Action, Bill, Plaint, Information, or Suit to be commenced or proſecuted by force, of, or according to the purport of this Act, as in an Action of Treſpaſſe, Vi & armis, at the Common law: but upon no other popular Action, Bill, &c. which is not ſued, &c. by force of this Act.

The ſecond part of this Act doth meet with the ſecond of the ſaid three miſchiefs, and ſtandeth upon three branches. The ſecond part of the Act.

Firſt, that in all Informations, &c. exhibited, &c. either for the King or any other, &c. the offence ſhall be layed and alledged, &c. in the ſaid County where ſuch offence was in truth committed, and not elſewhere.

The ſecond branch is, that if the defendant pleadeth the generall iſſue, the plaintiffe or informer upon evidence to the Jury muſt prove two things: Firſt, the offence laid in the information, &c. Secondly, that the offence was committed in that County, otherwiſe the defendant ſhall be found not guilty.

The third branch is, that for more ſurety that the offence ſhall be alledged truly in the proper County where in truth it was committed, no information, &c. ſhall be received, filed, or entred of Record, untill the Informer, or Relator hath firſt taken a corporall oath before ſome of the Judges of that Court, which conſiſteth on two parts: Firſt, that the offence or offences laid in ſuch Information, &c. were not committed in any other County, then where the ſame are alledged in the Information, &c. Secondly, that he believeth in his conſcience, that the offence was committed within a year before the information or ſuit. And this Oath is to be entred of Record. And all this is to be done before the Information be received, filed, or entred of Record.

The third part of this Act meeteth with the laſt miſchiefe: for by this part the defendant may plead the generall iſſue, and give any ſpeciall matter in evidence to the Jury: which matter being pleaded, had been a good and ſufficient matter in law, to have diſcharged the defendant, &c. The third part of the Act.

This is a very beneficiall clauſe, and cleereth many queſtions at the Common law. And where it may be objected, that for want of ſufficient Clerks, the proceeding according to this ſtatute will be erroneous, and to be reverſed by Writ of Errour, ſo as it will deter Informers to informe, &c. and in effect, lay aſleep all penall lawes. To this it may be anſwered, Fir, that it ſhall be the fault of the Informer himſelfe; for if he informe before Juſtices of Aſſiſe or Niſi prius, they 27 H.8.f.21, &c.

they have ſufficient Clerks. Secondly, I perſwade my ſelfe, that the other Juſtices will in diſcharge of their conſcience and duty, provide ſufficient Clerks. And laſtly, that few or no errours ſhall fall out in reſpect of the generall pleading.

The laſt clauſe of this Act is this, Provided alwayes that this Act or any thing therein contained, ſhall not extend to any information, &c.

By this clauſe this Act extends not to penall ſtatutes of theſe ſorts: Concerning 1. Popiſh Recuſants for not comming to Church. 2. Maintenance, Champerty, or buying of titles. 3. The ſubſidie of Tonnage and Poundage, Wooll, &c. 4. The defrauding the King of any Cuſtome, Tonnage, Poundage, Subſidie, Impoſt, or Priſage. 5. Tranſportation of Gold, Silver, Powder, Shot, Munition of all ſorts, Wooll, Woolfels, or Leather, but that every of theſe offences may be layed or alledged to be in any County at the pleaſure of any Informer. But yet the Informer cannot informe, &c. for any of theſe offences in any of the Courts at Weſtminſter, but before the Juſtices appointed by this Act: for this clauſe extendeth only for the laying or alledging of any of theſe offences in any County that he will.

Mic. 29. & 30 El. Coram Rege.

Inter Wideſton & Clark Maior of Nottingham, the caſe was this. Wideſton being arreſted in Nottingham by Precept in the nature of a Capias, he was impriſoned in the cuſtody of the Maior being Keeper of the Gaol within the ſame towne, and before the returne of the Precept Wideſton offered to the Maior ſufficient ſurety to appeare, &c. and he refuſed to accept the ſame: whereupon Wideſton brought his Action by Bill upon the ſtatute of 23 H. 6. cap. 10. whereunto the defendant pleaded the generall iſſue; and it is found by verdict againſt the defendant. In arreſt of judgement it was ſhewed, that by the ſaid ſtatute of 18 Eliz. cap. 5. it is provided, that none ſhall be admitted or received to purſue againſt any perſon upon any penall ſtatute, but by way of information or originall action, and not otherwiſe: In reſpect of the ſaid negative words it was adjudged, that, for that the ſaid Action was brought by Bill, and not by Information or Originall, Quod querens nihil capiat per billam. See the reſt of the ſtatute of 18 Eliz. concerning Informers.

18 Eliz. cap. 5.

Vi. Lib. 6. fo. 19. b. Gregories caſe.

You have heard of four viperous Vermin, which endeavoured to have eaten out the ſides of the Church and Common-wealth: Three whereof, viz. the Monopoliſt, the Diſpencer with publick and profitable penall lawes for a private, and the Concealers are blowne up, and exterminated: and the fourth, viz. the Vexatious Informer well regulated and reſtrained, who under the reverend Mantle of Law and Juſtice inſtituted for protection of the innocent, and the good of the Common-wealth, did ver and depauperize the Subject, and commonly the poorer ſort, for malice or private ends, and never for love of Juſtice. And theſe are worthily placed amongſt the Pleas of the Crowne, becauſe it is for the honour and benefit of the Crowne, when the Church and Common-wealth do flouriſh in peace and plenty: for the King can never be poore, when his Subjects are rich.

Hil. 36 Eliz. Rot. 135. Int. plac. Regis, coram Rege. Hamonds caſe.

George Hamond informed upon a penall ſtatute concerning ſhipping of Cloth in the name of another. Qui tam, &c. againſt Edw. Griffith defendant. Hamond the Informer died and upon motion made by the Attorney Generall, it was the opinion of the whole Court, that he the Attorney Generall might proceed for the Queens Moity after the death of the Informer.

Trin. 31 Eliz. coram Rege. Strettons caſe.

Between Stretton, Qui tam, &c. and Tayler defendant, that after a popular Action commenced, although the Attorney Generall will enter an Ulterius non vult proſequi; or if the defendant plead a ſpeciall plea, although the uſe be, that the Attorney (to the end that there may be no jugling or Covin between the Informer and the defendant) reply only; notwithſtanding, if the Attorney Generall will not reply, the Informer may proceed, and proſecute for his part; for the Informer by his ſuit commenced hath made of a popular Action his private, which the King cannot for the part of the Informer pardon or releaſe. And notwithſtanding in all theſe caſes before any Action or Information commenced by the Informer, but the ſuit remaining popular wherein the King only, and no

See hereafter cap. 105. of Pardons.
37 H. 6. fo. 4.
5 E. 4. 3.
2 R. 3. fo. 12.
1 H. 7. 3.

Subject

Subject hath any intereſt, the King may pardon and releaſe theſame: for after that pardon, no Informer can informe tam pro Domino Rege, quam pro ſeipſo, according to the ſtatute, &c. and for himſelfe only in a popular Action he cannot informe.

CAP. LXXXIX.

Of Foreſtalling, Ingroſsing, &c.

FOriſtel [a], Fariſtel, [b] Foriſtellum, & Foriſtellarius, derived of two Saxon words, viz. far or fare (via or iter) unde fare for a paſſage and farewell, to go or proceed well: we have turned far, to for and ſtall, which we retaine ſtill, and ſignifieth interceptionem, or [c] impedimentum tranſitus, hinderance or interception. And the offender is called Forſtellarius. See of this offender in the ancient ſtatute: [d] Nullus Forſtellarius in villa patiatur morari, qui pauperum ſit depreſſor manifeſte, & totius Communitatis, & Patriæ publicus inimicus, qui bladum, piſces, allec, vel res quaſcunque venales per terram, vel per aquam venientes, quandoque per terram, quandoque per aquam obviando præ cæteris feſtinat, lucrum ſitiens vitioſum, pauperes opprimens, ditiores decipiens, qui ſic minus juſte illo qui eos apportaverit multo magis vendere machinatur. Qui mercatores exterraneos venalibus venientibus circumvenit, offerens ſe venditioni rerum ſuarum, & ſuggerit, quod bona ſua carius vendere poterunt, quam vendere proponebant, & ſic arte, vel ingenio villam ſeducit & patriam. Primo convictus graviter amercietur, ſecundo ſubeat judicium Pilloriæ, tertio incarceretur, & redimatur, quarto abjuret villam. Et hoc judicium fiet de Forſtallariis univerſis, & ſimiliter de his qui * conſilium aut auxilium eiſdem præſtiterint vel favorem, &c. And his deſcription ſee in a latter Act. See before in the Chapter of Monopolifts.

Ingroſſator or Engroſſator, of the Engliſh & French word, groſſe, that is, great or whole, unde Merchant-groſſier, a Merchant that ſelleth by great or whole-ſale. We remember not that we have read of this word [ingroſſe] in any Act of Parliament, Book-Caſe, or Record, but [e] rarely, before the ſaid Act of 5 E. 6. And there is an Ingroſſer by the Common lawes, who is hereafter deſcribed. And there is an Ingroſſer by Act of Parliament, and he is deſcribed by the ſtatute of 5 E. 6. And by that Act a [f] Regrator is alſo deſcribed, who is a kinde of Ingroſſer. Regrator is derived of the French word Regratement, for Huckſtery. But in ancient time both the Ingroſſor and Regrator were comprehended under Foreſtaller.

It was [g] reſolved by the Juſtices and Barons of the Exchequer upon conference betwixt them, that Salt is a victuall, and the buying and ſelling thereof was within the ſtatute of 5 E. 6. for it was not only of neceſſity of it ſelfe for the food and health of man, but it ſeaſoneth and maketh wholeſome Beefe, Pork, &c. Butter, Cheeſe, &c. and other Viands. And Peryam Juſtice ſaid, [h] Hil. 26 Eliz. in Cõi banco, that ſo it had been lately adjudged.

[i] Mich. 6 Jac. in Scaccario, in an Information by Baron againſt Boy, upon the ſtatute of 5 E. 6. cap. 14. of Ingroſſers for buying and ſelling of Apples; the defendant pleaded not guilty, and was found guilty. But the Barons gave judgement againſt the Informer, and cauſed an Entry to be made in the Margent of the Record, that the judgement was given upon matter apparent to them, that Apples were not within the ſaid Act, for that the Act is to be intended of victuall neceſſary for the food of man, the words of the Act being [Corne, Graine, Butter, Cheeſe, Fiſh, or other dead victuall] which is as much as to ſay, (of other dead victuall of like quality: id eſt, of like neceſſary and common uſe.) And therefore

See the firſt part of the Inſtitutes. Sect. 240. Domeſday.

a Chent. Dover. ter.

b Wirceſter. Scirropſcir Civitas.

c Fleta lib. 1. ca. 42. § foreſtall. & lib. 4. cap. 11. Britton fo. 33. a. 77. a.

d Vi. Vet. M. C. part 2. 24 b. 34 E. 1. de Piſtor. Braciatoribus & aliis Victuellariis, & de Foreſtellariis, hic infra.

* 51 H. 3. Raſt. weights and meaſures. 4. 25 E. 3. c. 3. ſtat. 3 27 E. 3. cap. 11. ſtat. ſtap. 28 E. 3. cap. 13. 5 E. 6. cap. 14. 5 Eliz. cap. 12. 13 Eliz. cap. 25.

e For the word [*Ingroſſer*,] ſee 27 E. 3. c. 5. ſtat. 1. 37 E. 3. cap. 5.

f For this word [*Regrator*,] ſee 51 H. 3. weights and meaſures. 4. Raſtall. 14 R. 2. ca. 4. 8 H. 6. cap. 5. Regrators or Choppers, and in ſome countries called Jobbers.

g M. 44 & 45 El. at Serjeants Inne in Fleetſtreet.

h Hil. 26 Eliz. judgement cite p *Peryam* Juſtice

i M. 6 Jac. in Scac. Inr. *Baron* & *Boy*.

therefore Apples being rather of pleaſure then neceſſity, are not within the ſaid ſtatute no more then Plumbs, Cherries, or other fruit; and no information hath ever been exhibited for ingrolling of Apples, Plumbs, Cherries, or other fruit: but the ſtatute of 2 E.6. cap. 15. doth forbid conſpiracy of Coſtermongers and Fruterers, and maketh ſuch conſpiracie unlawfull. And the ſaid judgement of the Barons was affirmed in a Writ of Errour in the Exchequer Chamber.

P.18.E.2.Coram Rege Rot. 76. Southt'.

Venditio Braſei non eſt venditio Victualium, nec debet puniri ſicut venditio panis, vini, & cerviſiæ, & hujuſmodi, contra formam ſtatuti. But the Act of 5 E.6. hath made corne, graine, &c. to be victuall within that Act. Vide Vet. N. B. 2. part 23. b. Stat. de Piſtor, Braceator, & aliis Victelariis. 34 E. 1.

Mich. 39 & 40. El. Reſolution de touts les Juſtices.

* Dardanarius. An Ingroſſer by the common law deſcribed.

It was upon conference and mature deliberation reſolved by all the Juſtices, that any Merchant, Subject or Stranger, bringing victuals or merchandize into this Realme, may ſell them in groſſe; but that vendee cannot ſell them againe in groſſe, for then he is an * Ingroſſer according to the nature of the word, for that he buy ingroſſe, and ſell ingroſſe, and may be indicted thereof at the Common law, as for an offence that is malum in ſe. 2. That no Merchant or any other may buy within the Realme any victuall or other merchandize in groſſe, and ſell the ſame in groſſe againe, for then he is an Ingroſſer, and punishable, ut ſupra: For by this means the prices of victuals and other merchandize ſhall be inhaunced, to the grievance of the Subject; for the more hands they paſſe through, the dearer they grow, for every one thirſteth after gain, vitioſum ſitiunt lucrum. And if theſe things were lawfull, a rich man might ingroſſe into his hands all a commodity, & ſell the ſame at what price he will. And every practice or device by act, conſpiracy, words or newes, to inhaunce the price of victuals or other merchandize, was punishable by law; and they relied much upon the ſtatute aforeſaid, Nullus forſtallarius, &c. which ſee before in this Chapter: and that the name of an Ingroſſer in the reigne of H. 3. and E. 1. was not known, but comprehended within this word [forſtallarius] lucrum ſitiens vitioſum; and ingroſſing is a branch of foreſtalling. And for that forſtellarius was pauperum depreſſor, & totius Communitatis & Patriæ publicus inimicus, he was punishable by the Common law.

—Lucrumq; acquirit eundo, Nivis utexiguus creſcit eundo globus.

3 E.2. Action ſur leſtat. F.N.B. 250. I.

43 Aſſ. p. 38. Tit. Aſſ. 354.

They had alſo in conſideration the Book in 43 Aſſ. where it was preſented, that a Lombard did procure to promote and inhaunce the price of merchandize, and ſhewed how: the Lombard demanded judgement of the preſentment for two cauſes. 1. That it did not ſound in foreſtalling. 2. That of his endeavour or attempt by words, no evill was put in ure, (that is) no price was inhaunced, & non allocatur, and thereupon he pleaded not guilty: whereby it appeareth, that the attempt by words to inhaunce the price of merchandize was punishable by law, and did ſound in foreſtalment: and it appeareth by the Book that the punishment was by fine and ranſome. And in that caſe Knivet reported, that certaine people (and named their names) came to Coteſwold in Hereforſhire, and ſaid in deceipt of the people, that there were ſuch wars beyond the ſeas, as no Wooll could paſſe or be carried beyond ſea, whereby the price of wools was abated: and upon preſentment hereof made, they appeared; and upon their confeſſion they were put to fine and ranſome. See the ſtatute of 25 H. 8. cap. 2. whereby the Lords of the Councell, Juſtices, &c. or any ſeven of them, &c. have power to ſet prices on victuals, and the ſame to be proclaimed under the Great Seale.

Nota, the abatement by undue means of the price of our native commodities, is punishable by fine and ranſome. See 23 E.3.ca.6. 13 R.2.cap.8.

For preventing of all ingroſſing and foreſtalling, it was the ancient law before the Conqueſt, Decrevimus porro, ne quis extra oppidum quicquam 20 Denariis carius æſtimatum emat, verum intra portum præſente oppidi præfecto, aliove viro fideli, aut ipſo denique præpoſito regio, in celebri plebis concurſu, & hominum oculis quiſque mercator.

Inter leges Ethelſtani, cap. 12.

Interdicimus etiam, ut nullæ pecudes emantur niſi infra civitates, & hoc ante tres fideles teſtes, nec alia neceſſaria ſine fideijuſſore & warranto, &c. Item, nullum mercatum vel feria ſit, nec fieri permittatur, niſi in civitatibus regni noſtri, & in burgis, &c.

Inter leges Will. Conqueſt. fo. 125.

Commiſſio

Commiſſio facta fuit Roberto Hadham ad vendend' blada & alia bona diverſarum Abbathiarum alienigenarum, qui venit & cognovit, quod vendidit blada prioris de Tickford in garbis in duabus * taſſis exiſtent' pro 10 li. quæ venditio facta fuit contra legem & conſuetudinem regni Angliæ, vendend' in garbis, priuſquam triturat' fuerunt, quod fieri debuiſſet per menſuram poſt eorum triturationem: Ideo committitur priſonæ, & adjudicatur, quòd ab omni officio Domini Regis amoveatur, & quòd finem faciat cum Domino Rege.

Hil. 25 E.3. coram Rege. Rot. 13. Buck. Hadham's caſe.

* Or the French word *Teſer*, to heape in Gowes or Stacks.

Obſerve well this judgement, that it is againſt the Common law of England to ſell corne in sheafes before it is threſhed and meaſured, and the reaſon thereof ſeemeth to be, for that by ſuch ſale the Market in effect is foreſtalled.

See 5 E.6.ca.14. He is an Ingroſſer that buyes (other then by grant or leaſe of land or tithe) any corne growing in the fields, &c.

CAP. XC.

Againſt Roberdſmen.

IT is an Engliſh Proverbe; That many men talk of Robin Hood, that never ſhot in his Bow: and becauſe the Statutes and Records hereafter mentioned cannot well be underſtood, unleſſe it be known what this Robin Hoode was that hath raiſed a name to theſe kinde of men called Roberdſmen, his followers, we will deſcribe him.

This Robert Hood lived in the reigne of King R. [illegible] in the borders of England and Scotland, in Woods and Deſerts, by robbery, burning of houſes, felony, waſte and ſpoile, and principally by and with Vagabonds, idle wanderers, nightwalkers, and drawlatches: ſo as this notable thiefe gave not only a name to theſe kinde of men, but there is a Bay, called Robin Hoods Bay, in the River of in Yorkſhire. And albeit he lived in Yorkſhire, yet men of his quality took their denomination of him, and were called Roberdſmen throughout all England.

He was, ſaith Maior Scotus, prædonum princeps, & prædo nobiliſſimus.

Againſt theſe men was the ſtatute of Winchester made in 13 E.1. for preventing of robbery, murders, burning of houſes, &c. Alſo the ſtatute of 5 E.3. which reciting the ſtatute of Winchester, and that there had been divers manſlaughters, felonies, and robberies done in times paſt, by people that be called Roberdſmen, Waſters, and Drawlatches, and remedy provided by that Act for the arreſting of them.

13 E.1. Statut. de Winchest. ca.1.4
5 H.7. fo.5.
5 E.3.cap.14.

At the Parliament holden 50 E.3. it was petitioned to the King that Ribands and ſturdy Beggers might be baniſhed out of every towne. The anſwer of the King in Parliament was touching Ribands; The ſtatute of Winchester and the declaration of the ſame with other * ſtatutes of Roberdſmen, and for ſuch as make themſelves Gentlemen, and men of Armes, and Archers, if they cannot ſo prove their ſelves, let them be driven to their occupation or ſervice, or to the place from whence they came.

Rot. Parl. 50 E.3. nu.61.

* 5 E.3.cap.14.
2 H.5.cap.9.
8 H.6.cap.14.
Vid.39 Eliz.ca.4.

It is provided by the ſtatute of 7 R.2. that the ſtatutes made in the time of King Edward, Grandfather of the King, of Roberdſmen, and Drawlatches, be firmely holden and kept, and further proviſion againſt Vagabonds wandring from place to place. See a law made in the firſt Parliament of Queen Mary, Anno Dom. 1555 in Scotland againſt Robert Hood, Little John, &c.

7 R.2.cap.5.
Vid.39 Eliz.ca.4.

CAP. XCI.

Of Bankrupts.

VIde in the fourth part of the Institutes, Cap. The Court of the Commissioners of Bankrupts.

CAP. XCII.

Of Recusants.

1 Eliz. cap. 2.
23 Eliz. cap. 1.
28 Eliz. cap. 6.
35 Eliz. cap. 1, 2.
3 Jac. cap. 4.
7 Jac. cap. 6.

FIrst, the Acts of Parliament that are made against them are 1 Eliz. cap. 2. 23 Eliz. cap. 1. 28 Eliz. cap. 6. 35 Eliz. cap. 1, & 2. 3 Jac. cap. 4. 7 Jac. cap. 6. These Acts of Parliament are interpreted and expounded by divers judgments and resolutions heretofore given.

Lib. 10. 54. the Chancelour of Oxfords case.
Lib. 11. 56, 57, &c. Dr. Fosters case.
Lib. 5. fo. 1. Caudries case.
Dier 3 Eliz. fo. 203.

Lib. 10. fo. 54. &c. Le case de Chancelour, &c. de Oxford, an exposition of the statute of 3 Jac. ca. 4. Et lib. 11. fo. 56, 57, &c. Doctor Fosters case, an exposition of all the said statutes. See Lib. 5. fo. 1. &c. Caudries case. See Dier 3 Eliz. fo. 203. an exposition of the said Act of 1 El. concerning hearing of Masse.

CAP. XCIII.

Of Newes, Rumours, &c.

Tacitus.

SEE the Second part of the Institutes, W. 1. cap. 33. Newes. See also in the fourth part of the Institutes, cap. Chancery, in the Articles against Cardinall Woolsey, Artic. 32. Convicia, si irascaris, tua divulgas, spreta exolescunt; If you seek to revenge slanders, you publish them as your own; if you despise them, they vanish.

Int. leg. Alveredi cap. 28.

The law before the Conquest was, that the author and spreader of false rumours amongst the people had his tongue cut out, if he redeemed it not by the estimation of his head.

CAP. XCIV.

Of VVeights and Measures.

SEE the second part of the Institutes, W. 1. cap. 4. and the exposition upon the same.

CAP.

CAP. XCV.

Of Apparell.

DIverse Acts of Parliament have been made against the excesse of Apparell in the reign of E. 3. As 11 E. 3. cap. 2. & 4. 37 E. 3. ca. 8, 9, 10, 11, 12, 13, 14. 38 E. 3. cap. 2. In the reign of E. 4. 3 E. 4. cap. 5. 22 E. 4. cap. 1. In the reign of H. 8. 1 H. 8. cap. 14. 6 H. 8. ca. 1. 7 H. 8. cap. 7. 24 H. 8. cap. 13. 33 H. 8. cap. 5. 37 H. 8. ca. 7. 1 & 2 Ph. & Mar. ca. 2. 4 & 5 Ph. & Mar. c. 2. 5 El. ca. 6. 8 El. ca. 11. 13 El. ca. 19. Some of them fighting with, and cuffing one another, some of them expired. But forasmuch as those that stood in force were obsolete, and remained but as snares to catch over men at the pleasure of the Promooter; at the Parliament holden Anno 1 Ja. all Acts of Parliament before that time made concerning Apparell are repealed, and abrogated, and since that time no Act hath been made concerning Apparell, and so standeth the law at this day. 1 Jac. R. ca. 25. Three costly things there are that doe much impoverish the subjects of England, viz. Costly Apparell, costly diet, and costly building. The best meane to represse costly Apparell, and the excesse thereof, is by example; for if it would please great men to shew good example, and to weare Apparell of the cloth and other commodities wrought within the Realm, it would best cure this vain, and consuming ill, which is a branch of prodigality, and herewith few wisemen are taken. If you will looke into the Parliament Roll of 2 H. 6. you shall see what plain and frugall Apparell that renowned King H. 5. after he was King did wear, his gown of lesse value then 40. s. Excesse of Apparell is best cured, exemplo & vicuperio. Rot. Parl. 2 H. 6. nu. 30.

Magna corporis cura, magna animi incuria.

Non induetur mulier veste virili, nec vir utetur veste fœminea: abominabilis apud deum, qui facit hoc. Deut. 22. 5.

CAP. XCVI.

Of Diet.

[a] Rot.Claus. 9 E.2.m.26. in Dorſſ. intitled *Ordinatio ſuper menſuratione ſerculorum.*

THere was [a] an Ordinance made by King E.2. by advice of his Councell againſt the exceſſe of Diet, but becauſe it had not the ſtrength of an Act of Parliament, it wrought no effect.

[b] 2 E.6.cap.19. 5 E.6.ca.3. 5 El.ca.5. 27 El.ca.11. 35 El.ca.7.

[b] It is provided by ſtatutes made in the reigns of E.6. & Queen Elizabeth, that no fleſh ſhall be eaten on Fiſh-days, viz. Friday, Saturday, Embring days and Vigils, and the time of * Lent; [c] and for licences to eat fleſh on Fiſh days, &c. See the Preamble of the Statute of 2 E.6.ca.19.

* *Lent* 2. Saxon. *Quinreſme. Quadrageſima.*

¶ Embring days, ſo called becauſe in former times when they faſted they put Aſhes or Embers on their heads. Job 2.12. Jer.6.26. 2 Sam.13.19. And as the naturall converſion of the fleſh of the body is to duſt, ſo the ſins of the ſoul (unrepented) are turned to fire, and this was ſhadowed under Embers that ever keep fire.

[c] Here of ſee the 4.part of the Inſtitutes, cap. The Court of Audience, &c. and Faculties.

* Vide Britton cap.53. and other books make mention of theſe.

* Theſe Embring days are the week next before Quadrageſima, ſo called, for that it is the fortieth day before Eaſter, and is the firſt Sunday in Lent. So Quinquageſima the Sunday fifty days before Eaſter, Sexageſima ſixty days before Eaſter, and Septuageſima ſeventy days before Eaſter.

Before theſe late Acts the eating of fleſh on Fridays was puniſhable in the Eccleſiaſticall Court, as yet it is, the jurisdiction being ſaved by the ſaid Acts.

But there is no Act of Parliament againſt exceſſe of diet, for it is known to be ſo hurtfull for mans body, and ſo obſcureth the faculties of the mind, as the underſtanding, memory, &c. as to men, ſpecially to Chriſtian men, there needed no law at all to be made, ever being mindfull of that Caveat, [d] Attendite autem vobis, ne forte graventur corda veſtra in crapula, & ebrietate, &c.

[d] Luc.c.21.v.34. Rom.ca.13.v.13. Eccleſiaſticus ca.37.v.30,31.

[e] Eccleſiaſticus 31.20.

[f] Cicero.

[e] Vigilia, & cholera, & tortura viro infrunito; Somnus ſanitatis homini parco dormiet uſque in mane, & anima illius cum ipſo delectabitur. The Morall heathen men by the light of nature agree hereunto. [f] Tantum cibi et potus adhibendum eſt, ut reficiantur vires, non opprimantur.

Horace 2.Ser.2.

> Accipe tu, victus tenuis quæ, quantaque ſecum
> Afferat, imprimis valeas bene: nam variæ res
> Ut noceant homini, credas, memor illius eſcæ,
> Quæ ſimplex olim tibi ſederit: At ſimul aſſis
> Miſcueris elixa: ſimul conchylia turdis:
> Dulcia ſe in bilem vertent, ſtomachoque tumultum
> Lenta feret pituita: vides, ut pallidus omnis
> Cœna deſurgat dubia? ——— ———

Ex plenitudine generantur morbi, qui ſuperant medicorum artem.

[g] From whence exceſſe of drinking in England came.

[h] From whence troops of idle ſervingmen came into England.

[i] 4 Jacobi c.5. See 1 Ja.ca.9. 7 Ja.ca.10. 21 Ja.c.7. an excellent law.

Una ſalus ſanis nullam potare ſalutem.

King Edgar permitting many of the Danes to inhabite here ([g] who firſt brought into this Realm exceſſive drinking) was in the end conſtrained to make a law againſt this exceſſe (which never commeth alone) driving certain nails into the ſides of their cups, as limits, and bounds, which no man upon great pain ſhould be ſo hardy as to tranſgreſſe.

William of Malmesbury, comparing Engliſhmen and Normans together, ſaith, that in his time, the Engliſh manner was to ſit bibbing whole houres after dinner, [h] and that the Norman faſhion was to walk the ſtreets with great troops, with idle and looſe ſervingmen following them, both which were cauſes of many diſorders and outrages.

[i] If the exceſſe of drinking extend to the loathſome and odious vice of drunkenneſſe, it is puniſhable by Act of Parliament. And to ſay the truth, the ancient Britains were free from this crime.

Ecce

Ecce Britannorum mos eſt laudabilis iſte,
Vt bibat arbitrio pocula quiſque ſuo.

And the laws againſt drunkenneſſe are very new.

Nothing is here ſaid againſt that great Peacemaker, and branch of liberality, orderly hoſpitality, but againſt the dainty and diſorderly exceſſe of meats and drinks, which is a ſpecies of prodigality: for it is provided by Act of Parliament that the grace of Hoſpitality ſhall not be withdrawn from the needy. W. 1 3 E. 1 ca. 1.

See the Statute of 37 E. 3. ca. 8. againſt exceſſive apparell and diet: but it was repealed in the next Parliament, 38 E. 3. ca. 2.

CAP. XCVII.

Of Buildings.

WE have not read of any Act of Parliament now in force made againſt the exceſſe of Building, or touching the order or manner of building; but it is a waſting evill, whereunto ſome wiſe men are ſubject. See the 1. part of the Inſtitutes Sect. 1. fo. 5. a. Vet. Mag. Cart. 1. part fo. 162. cap. Eſchaetry, &c. 14 H. 6. nu. 7. licence to the D. of Gloc. to imbattel Greenwich.

But the Common law doth prohibit any ſubject to build any Caſtle, or houſe of ſtrength imbatteled, &c. without the Kings licence, for the danger that might enſue. [a] Alſo the Common law prohibiteth the building of any edifice to a common Nuſance, or to the Nuſance of any man in his houſe, as the ſtopping up of his light, or to any other prejudice or annoyance of him. Ædificare in tuo proprio ſolo non licet, quod alteri noceat.

[b] In Deuteronomy it is ſaid, Cum ædificaveris domum novam, facies [c] murum tecti per circuitum, ne effundatur ſanguis in domo tua, & ſis reus, labente alio, & in præceps ruente.

[d] I like well the Counſell to a Nobleman, whoſoever gave it. Si vis (ait ille) ædificare domum, inducat te neceſſitas, non voluptas; cupiditas ædificandi ædificando non tollitur; nimia & inordinata cupiditas ædificandi expectat ædificii venditionem: Turris completa, & arca evacuata faciunt tarde hominem ſapientem.

[a] Li. 9. f. 54 & 58. Lib. 5. fo. 101. &c.
[b] Deut. 22. 8.
[c] Battlements, This was for ſafety only.
[d] Bernhard. conſilium.

Ædificare domos multas, & paſcere multos,
Eſt ad pauperiem ſemita laxa nimis.

To build many houſes, and many to feed,
To poverty that way doth readily lead.

Euripides tranſlated by Sir Th. Moor.

Of theſe three it hath been truly ſaid: Veſtium, Conviviorum, & Ædificiorum luxuria ægræ civitatis ſunt indicia, & ſpecies prodigalitatis.

But by the Common law, and generall cuſtome of the Realm, it was lawfull for Biſhops, Earls, and Barons to build Churches, or Chappels within their Sees: and hereof King John informed Pope Innocentius the third (naming only, honoris cauſa, the Biſhops and Baronage of England, albeit this liberty extended to all) with requeſt that this liberty to the Baronage might be confirmed. To theſe Letters the Pope made this anſwer, Quod enim de conſuetudine regni Anglorum procedere regia ſerenitas per ſuas literas intimavit, ut liceat tam Epiſcopis, quam Comitibus, & Baronibus Eccleſias in feudo ſuo fundare, laicis quidem principibus id licere nullatenus denegamus, dummodo Dioceſani Epiſcopi eis ſuffragetur aſſenſus, & per novam ſtructuram veterum Eccleſiarum juſtitia non lædatur. Whereas the Baronage had abſolute liberty before, now the Pope addeth the conſent of the Biſhop: but that addition bound not, ſeeing it was againſt the liberty of the Baronage warranted by the Common law: and we would not have rehearſed this Epiſtle, but that it is a proof what the generall cuſtome of the Realm was concerning the building of Churches

Vide the like in the Regiſt. 36. b. Prohib. de decimis ſeperatis. In Epiſt. decret. Innocent. 3. l. 10. pag. 228.

Tr. 20 E. 1. Rot. 13 in banco Rich. de Turnys caſe. Eborum.

ches by the Baronage of England. And albeit they might build Churches without the Kings licence, yet could they not erect a spirituall politique body to continue in succession, and capable of indowment without the Kings licence: but by the Common law before the statutes of Mortmain, they might have indowed this spirituall body once incorporated, perpetuis futuris temporibus, without any licence from the King, or any other.

And as the law is in cases of Devotion and Religion, so it is in cases of Charity: Any man may erect and build a house for an * Hospitall, School, Workinghouse, or house of Correction, or the like, without any licence, for that is but a preparation, and may be done as owner of the soyl; but by the Common law could not incorporate any of them without licence, but now he may, & indow them with lands in certain cases, [a] by the statutes of 39 Eliz. cap. 5. and 3 Car. ca. 1. as in the Second part of the Institutes in the exposition of those statutes it appeareth.

Concerning the building or erecting of [b] Tombs, Sepulchers or Monuments for the deceased in Church, Chancell, Common Chappell, or Churchyard in convenient manner, it is lawfull, for it is the last work of charity that can be done for the deceased, who whiles he lived was a lively Temple of the holy Ghost, with a reverend regard, and Christian hope of a joyfull resurrection. And the defacing of them is punishable by the Common law, as it appeareth in [c] the book of 9 E. 4. 14. a. And so was it agreed by the whole Court, Mich. 10 Jac. in the Common place, between Corven and Pym. And for the defacing thereof, they that build or erect the same shall have the action during their lives, (as the Lady Wiche had in the case of 9 E. 4.) and after their deceases, the heir of the deceased shall have the action. But the building, or erecting of the Sepulcher, Tomb, or other monument ought not to be to the hinderance of the celebration of divine service. And in that case of Corven it was resolved, that albeit the freehold of the Church be in the Parson, yet if a Lord of a Mannor, or any other, that hath an house within the town or parish, and that he, and all those whose estate he hath in the mansion house of the mannor, or other house, hath had a seat in an Isle of the Church, for him and his family only, and have repaired it at his proper charges, it shall be intended that some of his Ancestors, or of the parties whose estate he hath, did build and erect that Isle for him and his family only: and therefore if the Ordinary endeavour to remove him, or place any other there, he may have a Prohibition. [d] It was further resolved, that if any man hath a house in a town or parish, and that he and those whose estate he hath in the house, hath had time out of mind a certain Pew, or seat in the Church maintained by him and them, the Ordinary cannot remove him, (for prescription maketh certainty, the mother of quietnesse) and if he doe, a prohibition lyeth against him. [e] But where there is no prescription, there the Ordinary that hath the cure, and charge of souls may for avoiding of contention in the Church, or Chappell, and the more quiet, and better service of God, and placing of men according to their qualities and degrees, take order for the placing of the parishioners in the Church or Chappell publique, which is dedicate and consecrate to the service of God.

Nota, Funerall expences according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever, for that is opus pium, or charitativum.

Amongst the people of Almighty God, as it appeareth in the holy History, Sepulture was ever had in great reverence, not only of Kings, but of other men; as (amongst many others) good old Barzillai, when he had excused himself for not going with the King to Jerusalem, he concluded, Obsecro ut revertar servus tuus, & moriar in civitate mea, & sepeliar juxta Sepulchrum patris mei, & matris mex, &c. 2 Sam. 19. 37.

And also the morall Heathens had building and erecting of Sepulchers, or Monuments in great account, as it doth appear by the Seven wonders of the world, which for memory may be expressed in these few Verses.

1. Pyramides

* Lib. 10. fo. 27. Le case de Suttons hospitall. See the statute of 39 El. cap. 4. whereby Authority is given to Justices of Peace to build and erect houses of Correction, &c.

[a] 39 El. ca. 5. 3 Car. ca. 1.

[b] *Tumba, tumulus, sepulchrum.*

[c] 9 E. 4. 14. the La. Wiches case, wife of Sir Hugh Wiche. Mich. 10 Ja. in Comuni banco Int' Corven & Pym. Barth. Cassaneus fo. 13. Conclus. 29. Actio datur, siquis arma in aliquo loco posita delevit, seu abrasit, &c.

[d] 8 H. 7. 12. a. per Hussy accord. Pasch. 10 Jac. in curia Cam. Stellatæ Inter Hussy Plaintif, & Kath. Layton, & al' Defendants iſſint resolve per le Court.

[e] 8 H. 7. 12. a. acc. 12 H. 7. 12. per Hussye.

1. Pyramides Memphis, 2. Babylonis mœnia celſæ,
3. Templum ingens Epheſi virgo Diana tuum,
4. Mauſoli Cariæ monumentum, 5. Raraque Pharo
Turris, 6. Olympiaci ſplendida imago Jovis,
7. Denique apud Rhodios ſplendentis ſtatua Phœbi:
Hæc ſeptem mundus mira, viator, habet.

Beſides the religious, and Chriſtian regard aboveſaid, theſe monuments do ſerve for four good uſes and ends. Firſt, for evidence, and proof of deſcents, and pedegrees. Secondly, what time he that is there buried deceaſed. Thirdly, for example, to follow the good, or to eſchew the evill. Fourthly, to put the living in mind of their end, for all the ſons of Adam muſt die. Statutum eſt hominibus ſemel mori.

Monumentum ſervat alicujus rei memoriam aliter interituram, eamque nobis repræſentat: and therefore a Monument is called a Memoriall.

Monumentum dicitur à monendo; quicquid enim nos monet eſt monumentum, ut ſepulchrum, quòd nos ſumus mortales.

Cum tumulum cernis, tum tu mortalia ſpernis:
Eſto memor mortis, ſiſque ad cœleſtia fortis.

It is to be obſerved, that in every Sepulcher, that hath a monument, two things are to be conſidered, viz. the monument, and the ſepulture or buriall of the dead. * The buriall of the Cadaver (that is, caro data vermibus) is nullius in bonis, and belongs to Eccleſiaſticall cogniſance, but as to the monument, action is given (as hath been ſaid) at the Common law for defacing thereof. * Britton fo. 84. b.

In the year of our Lord 1586, and in the 28 year of the reign of that glorious Queen Elizabeth, was the old gate called Ludgate in the City of London (as Stow ſaith) taken down to be new builded: There was found cowched within the old wall thereof a ſtone, wherein was graven in the Hebrew tongue and Characters, * an Epitaph, ſignifying in Engliſh: This is the Tomb of Rabbi Moſes ſon of the illuſtrious Rabbi Iſaac: which certainly was before the 23 year of the reign of H. 2. Anno Domini 1177. for before that time all the Jews in England were buried within the City of London, and in that year, ſaith Hovenden, Dominus rex pater dedit licentiam Judæis terræ ſuæ habendi cœmeterium in qualibet civitate Angliæ, extra muros civitatum, ubi poſſunt rationabiliter, & in competenti loco emere, ad ſepeliend' mortuos ſuos: prius enim omnes Judæi mortui Londoniâ ferebantur ſepeliendi. Stow in his Survey of London, fo. 19. * For ſo is the truth. Ro. Hovenden Anno Dom. 1177. Holl. eodem An. fo. 101. b. 20.

And albeit Churches or Chappels may be built by any of the Kings ſubjects, (as hath been ſaid) without licence, yet before the law take knowledge of them to be Churches or Chappels, the Biſhop is to conſecrate or dedicate the ſame: and this is the reaſon, that a Church or not a Church, a Chappell or not a Chappell, ſhall be tryed, and certified by the Biſhop. 8 H. 6. 32. 37.

See for this dedication or conſecration the 43 chapter of Ezechiel, the 23. chapter of Geneſis, the 90 Pſalme, the 24. 26, 27. 84. and 134. Pſalms. the 2 of Samuel 6. 10 of Saint John, verſ. 22. to the end.

Vide inter leges Edwardi Confeſſoris cap. 3. Similiter ad dedicationes, ad Synodos, & ad Capitula venientibus, &c. in eundo, & redeundo ſit ſumma pax.

We find in ancient times that Vaults, hollow places, or ſubſtructions under the ground were made by men for receits, or receptacles for keeping of their wives, children, money, and goods ſecret, to avoid violence, and rapine in time of hoſtility or rebellion, and we find no law againſt them. De ſubterraneis, ſubſtructionibus, & cryptis.

Theſe kind of buildings we had from the Germans, as we find it in Tacitus, who treating of the old Germans, ſaith, Solent & ſubterraneos ſpecus aperire, & ſi quando hoſtis advenit, aperta populatur, abdita autem & defoſſa aut ignorantur, aut eo ipſo fallunt, quod quærenda ſunt. They uſe to build Vaults under the earth, and if the enemy come, he deſtroyeth all open and above ground, but ſuch things as lie hidden in the cave, either they lie unknown, or at leaſt they deceive him, in that he is enforced to find them out. Neither have we found Tacitus.

any

any licence of the King to make them, nor punishment of any that made them without licence, and yet many have been made by many subjects, some whereof * we have seen.

* In the mannor of Minster Lovel in Com' Oxon' &c.

[a] We read of Alexander Bishop of Lincoln, in the reigns of H.1. and King Stephen, a Norman born, who was, insanis substructionibus ad insaniam delectatus.

a Camden Linc. pag. 406.

[b] No person can build or erect light-houses, Pharos, Sea-marks or Beacons without lawfull warrant and authority.

Lumina noctivagæ tollit Pharus æmula Lunæ.
In Light-house top is rear'd the light,
As high as the moon that walkes by night.

b See the statute of 8 El. ca. 13. and the Letters Patents of the Lord Admirall.

[c] Provision was made by authority of Parliament for building and erecting Blockhouses, Bulwarks, Piles, and the like, for without Parliament subjects cannot be charged with building [d] or erecting of them, and that Act is expired.

c 4 H.8. ca.1.
d De propugnaculis, munimentis, munitoriis, &c. of Bulwarks, Barbicans, Block-houses, Piles, &c.

[e] The Lord of the soil may build a Windmill, Sheepcote, Dairy enlarging of a court necessary, or a curtilage in grounds, where men have common of pasture.

e 13 E.1. ca. 46. 32 Ass. 5. 7 H. 4. 39.

[f] A man cannot erect any building upon his own ground in the Kings Forest, but it is a purpresture, and may either be demolished or arrented to the Kings use, &c. at a Justice Seat.

f 7 El. Dier 240.

Concerning houses of husbandry and tillage, the statutes of 4 H. 7. cap. 19. 7 H. 8. ca. 1. 27 H. 8. ca. 22. 5 E. 6. ca. 5. 5 El. cap. 2. are repealed by the statute of 21 Iac. cap. 28. and the statutes of 39 El. ca. 1 & 2. are expired, for that they were so like Labyrinthes, with such intricate windings and turnings, as little or no fruit proceeded of them.

[g] No man can erect an house or building to the Nusance of any other.

g See the 2. pt of the Institutes. W. 2. ca. 24. Lib. 5. fo. 101. Lib. 8. fo. 46. Lib. 9. fo. 54. 58.

[h] See where a man hath any house or mill, &c. and having any priviledge or thing appurtenant thereunto, and pull it down and build a new, where the priviledge or appurtenant remain and where not.

h See lib. 4. f. 84. Lutterels case, & the authorities there cited.

Concerning the erecting, &c. of Cotages, see the statute of 31 El. ca. 7. which could not be restrained in such sort as they are, but by authority of Parliament.

[i] There was a statute made Anno 35 El. (when I was Speaker) against buildings in the Cities of London, or Westminster, or within three miles of the gates of the City of London, and against the dividing & converting of any dwelling house or building into divers habitations, and against Inmates; but that endured but for seven years, and untill the end of the next Session of Parliament, which Act, being holden dangerous, was not continued at the Session of Parliament holden in 43 Eliz. being the next Session after the seven years, and therefore expired with the same. In the mean time there was a law made against new buildings, &c. which then was a warrant, and since hath been a colour for divers proceedings in Courts of Justice, not observing the expiration of that law; but now that law hath long since lost his force, and the ancient and Fundamentall Common law is to be followed.

i 31 Eliz. ca. 7.

Sylliva, or Sulliva is a word derived from the Saxon Sylle, and signifieth a poste, or plate fixed in the ground: the Saxon word is not yet out of use, for every man knows what a groundsille is.

Lamb. perambulation of Kent. These words, you shall read in Records concerning priviledges.

Pera, a Peer, derived from the Latin word Petra: Plance, of the English word planks, for boords or tables, in use also at this day.

Having spoken of erecting of houses and buildings, &c. we will tell you what we finde in our Books and Records of Dilapidation, and decay of buildings.

[k] Dilapidation of Ecclesiastical Palaces, houses, and buildings is a good cause of deprivation.

k 29 E. 3. 16. 2 H. 4. f. 3. 9 E. 4. 34.

[l] It appeareth by the statute of 4 H. 4. cap. 2. that Depopulatores agrorum were great offenders by the ancient law, and that the Appeal or Indictment thereof ought not to be generall, but in speciall manner; and provides, that the offenders therein might have their Clergy. They are called Depopulatores agrorum, for that by prostrating or decaying of the houses of habitation of the Kings people, they depopulate, that is, dispeople the towns.

l 4 H. 4. ca. 2. Lib. 11. fo. 29. Alex. Poulters case.

Prohibitio

Prohibitio Regis quòd Incolæ de villa de Southampton non proſternent domos ſuas in alias migraturi regiones. Dorſ. Clauſ. An. 43 E. 3. m. 23.

Simile pro magna Jermenutha. Rot. Clauſ. Anno 21 R. 2. m. 15.

That which may lawfully be prohibited before it be done, may be juſtly puniſhed after it be done.

And herewith we will cloſe up this Chapter: that the law doth favour the ſupportation of houſes of habitation, and uſe for mankinde. First part of the Inſtitutes f. 54. b. 56. b.

CAP. XCVIII.

De Lupanaribus & Fornicibus, &c.

Brothel-houſes, Eſtuis, Bordelloes.

The keeping of them is againſt the law of God, on which the Common law of England in that caſe is grounded. * Non offeres mercedem proſtibuli, nec precium canis in domo Dei tui, &c. Quia abominatio eſt utrumq; apud Dominum Deum tuum. Numb. 25. 9. Deut. 23. 18. Ezek. 16. 24. 31. 39. Joel 3. 3. 2 Mach. 4. 12. Hoſpes meritricis Lena. Leno, unde Lenocinium.

And the keeper, he or ſhe, of ſuch houſes is puniſhable by indictment at the Common law by fine and impriſonment: for although adultery and fornication be puniſhable by the Eccleſiaſticall law, yet the keeping of a houſe of Bawdrie or Stewes, or Brothell-houſe, being as it were a common nuſance, is puniſhable by the Common law, and is the cauſe of many miſchiefs, not only to the overthrow of the bodies, and waſting of their livelyhoods, but to the indangering of their ſoules. For the miſchiefs enſuing hereupon, ſee 11 H. 6. cap. 1. 1 H. 7. fo. 6. 12. 13 H. 7. 6. 27 H. 8. Rot. Parl. 14 R. 2. nu. 32.

King H. 8. ſuppreſſed all the Stewes or Brothel-houſes, which long had continued on the Bankſide in Southwark, for that they were (as hath been ſaid) prohibited by the law of God, and by the law of this land. And thoſe infamous women were not buried in Chriſtian buriall when they were dead, nor permitted to receive the rites of the Church whileſt they lived. * By Proclamation under the Great Seale 30 Martii. 37 H. 8.

The word Eſtuis or Stewes is French, we having no Engliſh word for it.

Before the reigne of H. 7. there were eighteen of theſe infamous houſes, and H. 7. for a time forbad them: but afterwards twelve only were permitted, and had ſignes painted on their wals; as a Boares head, the Croſſe keyes, the Gun, the Caſtle, the Crane, the Cardinals hat, the Bell, the Swan, &c. Fabian. Chron. Stowe.

Many wicked and common women had ſeated themſelves in a lane called Water-lane, next to the houſe of the Friers Carmelites in Fleet-ſtreet: This being an open and known wickednesſe, King E. 3. to the end theſe Friers might performe their Vowes, one of which was, to live in perpetuall chaſtity, took order for removing of theſe women. The Record ſaith, Rex præcipit Majori Civitatis London quod amoveri faciat omnes mulieres meretrices in venella prope Fratres Carmelitarum in Fleteſtreet inhabitantes. In Dorſ. Clauſ. 21 E. 3. part 1. m. 6. Fratres beatæ Mariæ de Monte Carmeli, called White Fryers.

Read 3 Regum cap. 14. verſe 24. eodem lib. cap. 15. verſe 12. & 4 Regum cap. 23. verſe 7.

And by the Common law it appertaineth to the Marſhall of the Kings Houſe to free, or protect the Court from Femes puteins, which is more particularly explained by Fleta, who ſaith, Mareſchalli intereſt virgatam à meretricibus omnib⁹ protegere & deliberare, & habet mareſchallus ex conſuetudine pro qualibet meretrice cõi infra metas hoſpitii inventa, 4^d primo die; quæ ſi iterũ in baliva ſua inveniatur, capiatur & coram Seneſchallo inhibeatur ei hoſpitium Regis, Reginæ, & liberorum ſuorum, ne iterum ingrediatur, & nomina earum imbrevientur: 7 E. 3. fo. 23, 24. Fleta lib. 2. cap. 5. Lib. 10. Le caſe de Marſhalſea. fo. 77.

quæ ſi iterum inventæ fuerint hoſpic' ſequutrices, tunc aut remaneant in priſona in vinculis, aut ſponte prædict' hoſpicia abjurentur; quæ ſi autem tertio inventæ fuerint, conſiderabitur quod amputetur eis treſſoria, & tondeantur; quæ quidem ſi quarto inveniantur, amputentur eis ſuperlabia, ne de cætero concupiſcantur ad libidinem.

Rot. Par. 14 R. 2. nu. 32.

14 R. 2. It is enacted that no Eſtews or Brothel-houſes ſhould be kept in Southwark, but in the common places thereſore appointed.

35 H. 6. Barre 162

So odious and ſo dangerous was this infamous vice (the faireſt end whereof is beggery) that men in making of Leaſes of their houſes, did adde an expreſſe condition, that the leſſee, &c. ſhould not ſuffer, harbour, or keep any Feme putein within the ſaid houſes, &c.

1 H 7. fo. 6. &c.

See the caſe of 1 H. 7. the cuſtome of London for entring into an houſe, and arreſting of an Advowtrer, and carrying her to priſon. In ancient times adultery and fornication were puniſhed by fine and impriſonment, and inquirable in Turnes and Leets by the name of Letherwite. We finde in Domesday De adulterio vero per totum Chent, habet Rex hominem, (*i.* amerciamentum hominis) & Archiepiſcopus mulierem, (*i.* amerciamentum mulieris) &c.

Domeſday. Chent. Dover.

Vidua, ſi alicui ſe non legitime commiſceb. 20 s. emendabit, puella vero 10 s. pro conſimili cauſa.

Ibid. Ceſtriæ civitas.

Adulterium faciens 8 s. & 4 d. emendabit homo, & fœmina tantundem. Rex habet hominem adulterum, Archiepiſcopus fœminam.

Ibid. Sudſex Lewes.

But now theſe offences belong to the Eccleſiaſticall Court.

Domeſday. Huntedoieſc. Bracton. Fleta. Raſtall term. leg. Stat. de expoſit. vocab.

Legrewita, or Logrewita, Legergeld, or Logergeld, of Legre or Logre for a bed, and Wite amerciament, by common ſpeech Letherwite or Lairewite, Lierwite, Lotherwite.

Childewite is for the Lord to take a fine for his Bondiwoman defiled and begotten with childe.

Bawdry, Lenocinium, unde Ribawdry & Ribaude, *i.* Impudicus rabula. See Parliam. 50 E. 3. nu. 61. of Ribauds and Robertſmen.

CAP.

CAP. XCIX.

De Aſſentatione, Fucologia, Pſeudologia, Flattery.

VVE find a law before the Conqueſt againſt flatterers in theſe words, Liccepar ȝ Leogopar þepepar ȝ þeapapar ȝober ȝnaman habban, &c. which Mr. Lambard tranſlateth thus, Aſſentatores, mendaces, prædones, & rapaces offenſionem Dei graviſſimam incurrant, &c. The ancient Manuſcript tranſlateth it thus, Seductores, mendaces, rapaces & raptores Dei gravamen habeant. And both tranſlations do in effect agree, for a flatterer is a ſeducer for ſome private end, by fained praiſe and humouring of another, whereby he hath an oultrecuidance of himſelfe, his ſtate, and actions, Iſti ducunt & ſeducunt.

Int. leges Canuti, fo. 106. c. 7. Lam. Fatalis magnatũ poteſtatũ peſtis, adulatio. Semper aſſentor id, quod is ad cujus voluntatem dicitur, eſſe magnum; ut in Terentio: magnas verò agere gratias mihi, &c. ſatis erat reſpondiſſe magnas, ingentes inquit.

The occaſion of making this law was, that King Canutus had been ſeduced by flatterers, who had ſhewed him his face and ſtate in a falſe glaſſe, making too great a ſhew of his own parts, actions, and ſtate, to the end to make him conceit himſelfe to be better and greater then he was, and his adverſaries leſſe, then in truth they were. Nay, this King by wicked flatterers aſſumed to him Divine power and honour: For comming from ſea, he ſet his feet on the ſea ſtrond, as the ſea was flowing, and commanded the ſea not to riſe to wet his Lordly and Majeſtick feet nor clothes: The ſea keeping on his accuſtomed courſe, both wet his feet and thighs alſo: whereat being ſore amazed repented his preſumption (which he had undertaken by wicked flattery).

And well is the flatterer marſhalled in this law with lyers, thieves, & raveners; for the Divine deſcribed flatterers to be thoſe, Qui colunt aliquem, & auferunt ab eo aliquid temporarii boni. So as it is peccatum viſcatum, it getteth away much and giveth ſmoke.

And the Holy Ghoſt hath ſtyled flattery oleum peccatoris, that is, the oile of the ſinner, κατ' ἐξοχὴν, that is, of him that exceedeth others in ſinne, and doth affect greatneſſe, that is the head, making it greater and more proſperous then it is, as you may reade in the Prophet David: Corripiet me juſtus in miſericordia, & increpabit me, oleum autem peccatoris non impinguet caput meum. Pſal. 141. 5. Whereby he being both a King and a Prophet, preferreth the reproofe, nay the ſharpe rebuke of the juſt and vertuous, before the ſmooth humouring of the flatterer (per nomen) of the ſinner. This oleum peccatoris is mel venenatum, & venenum mellitum, and commonly affecteth greatneſſe, and is called Lordbane.

And againe, David ſpeaking of the flatterer ſaith, His words are ſmoother then oile, and yet are they very ſwords. Pſal. 55. 22. Hæc dicit Dominus Deus, Væ qui conſuunt pulvillos ſub omni cubito manus, & faciunt cervicalia ſub capite univerſæ ætatis ad capiend' animas, &c. Ezech. 13. 18. Thus ſaith the Lord God, Woe to them that ſow pillowes under all armeholes, and put kerchiefes upon the heads of every age to hunt ſoules. They make the King glad with their wickedneſſe, and the Princes with their lyes. In malitia ſua lætificaverunt regem, & in mendaciis ſuis principes. Oſee. 7. 3.

The flattering mouth worketh ruine. Prov. 26. 28. And more Kings and Kingdomes have been overthrown by the means of flattery, then by publick hoſtility. Qu. Curtius. And this is the cauſe that we have mentioned the ſaid ancient law for their puniſhment, they be lawfully baniſhed from Princes Courts, and Subjects houſes.

Ut videat, æco ſit ſimia præda leoni:
Rex cæcus cernit, cum ſycophanta perit.

What fearfull ends flattering Favourites, corruptors of their Soveraigne Liege Lords, abusing their favours in subversion of their lawes, have had, appeareth in our Parliament Rolls, Records, and Historyes.

Nota, enemies to lawes punished by the lawes.

[a] King H. 3. had Hubert de Burgo Chiefe Justice and Earle of Kent, and many others: but this was his safety, that upon just occasion without any great griefe he could forgoe a Favourite. See in the Preface to the second part of the Institutes, his counsell to H. 3. to burne Magna Carta.

a Rot. Pat. Anno 17 H. 3. Nos integre & firmiter tenebimus judicium de Huberto de Burgo, per Barones datum.

E. 2. had [b] Pierce de Gaveston, the [c] Spencers, &c. and the Spencers proceedings against le grand Charter by name (amongst other things) tending to the subversion of law, &c.

Speed 18 H. 3. 520.

b Rot. Parl. 7 E. 2 Ne quis occasionetur per mortē Pet. de Gaveston Hil. 318. a. & ibid. 321. a

c Vet. Mag. Cart. 2 part 44. ib. 50. exilium Hugonis, & 54. Ne quis occasionetur pro feloniis in prosecutione d'Spencer patris & filii.

R. 2. had [d] Sir Robert Tresilian Chiefe Justice, &c. and Robert Earle of Oxford and Duke of Ireland, &c.

d Rot. Par. 11 R. 2 nu. 8. &c.

H. 6. had [e] William de la Pole Duke of Suffolk, &c. who endeavoured to have brought in the Civill lawes, which was the occasion that the Chiefe Justice Fortescue wrote in the commendation of the lawes of England, preferring them for the government of this land before the Civill lawes. This Duke with others plotted the death and destruction of Humfrey the good Duke of Glouc. who ever stood in his way.

e Rot. Par. 28 H. 6 nu. 19. untill 47.

E. 4. had [f] William Lord Hastings the Kings Chamberlaine, and Captaine of Callice. All these came to fearfull and untimely ends.

f Hollensh. 713. a. 30.

R. 3. had [g] Sir John Catesby one of the Justices of the Common Place, and Henry Duke of Buck. &c. privy plotters and counsellors with R. 3. for the most execrable murder of his Nephews E. 5. and Richard Duke of York. What a miserable end the Duke had, you know: and Justice Catesby in his journey to London, in the Kings high way had subitaneam & improvisam mortem.

g Hollensh. 722. 748. 767. a.

H. 7. had [h] Sir Richard Empson, Edmond Dudley, &c. Sir Richard Empson was indicted, Quod ipse consiliarius excellentissimi principis Henrici nuper Regis Angliæ septimi deum præ oculis non habens, sed ut filius diabolicus subtiliter imginans honorem, dignitatem, & prosperitatem dicti nuper regis, ac posteritatem regni sui Angliæ minime valere, sed ut ipse magis singulares favores dicti nuper Regis adhibere, unde magnat' fieri potuisset, ac totum regnum Angliæ secundum ejus voluntatem gubernare, falso, deceptive, & proditorie legem Angliæ subvertens, diversos ligeos ipsius nuper Regis, ex sua falsa covina, & subtili ingenio, contra communē legē regni Angliæ de diversis feloniis, &c. indictari fecit, &c. per quod plures & diversi populi dicti nuper Regis hiis gravaminibus, & indebitis exactionib' multipliciter torquebantur, in tantum quod populi dicti nuper regis versus ipsum nuper regem multipliciter murmurabant, & malignabant, in magnum periculum ipsius nuper regis regni sui Angliæ, ac subversionem legum & consuetudinum ejusdem regni, &c. And the like indictment was against Dudley.

h Coram Rege An. 1 H. 8. In information vers. D. Peter & alios. The like indictment against Edw. Dudley.

H. 8. had Thomas Woolsey Cardinall. Ipse intendens finaliter antiquissimas Angliæ leges penitus subvertere, & enervare, universumq; hoc regnum Angliæ & ejusdem regni populum legibus Imperialibus, vulgo dict', Legibus Civilibus, & earundem legum Canonibus subjugare & subducere, &c.

Tr. 23 H. 8. coram rege. Rot. 14.

We will for some causes descend no lower. Qui eorum vestigiis insistunt, eorum exitus perhorrescant.

But that right be done to him, who was a faithfull favorite and counseller to this King, we have seen a Manuscript that relateth, that Charles Brandon Duke of Suffolk a wise and warlike person, was for many years before his decease the greatest favourite the King had, upon whom he chiefly relied in all his weightiest affairs. This noble Duke deceased in August in the 37 year of the reign of King H. 8. After whose death the next time the King sat with his Councell, and missing the good Duke, grievously lamented for him, and said, that when I was offended with any (as often I was) and acquainted him therewith, that he ever endeavoured to mitigate my displeasure, and never spake to me evill of any of them. And the King looking upon the Lords of his Councell one after another, said, and so (my Lord) cannot you say, perusing them all throughout. A royall commendation of this great Duke, and a great argument of his piety and honour, that

that no subject had ever the indignation or displeasure of his Soveraign, by any private whispering of his.

We will conclude this chapter with one of our own Historics. Generaliter cunctorum habitatorum terræ peccatis inclusive ordines famendo Mendicantium ad cumulandum causas malorum, &c. isti possessionatis invidentes, procerum crimina approbantes, commune vulgus in errore foventes, & utrorumque peccata comedentes, pro possessionibus acquirendis, qui possessiones renunciaverant pro pecuniis congregandis: qui in paupertate perseverare juraverant, dicunt bonum malum, & malum bonum, seducentes Principes adulationibus, Plebem mendaciis, & utrosque secum in devium pertrahentes, &c. Note what is said, that the full heap of the causes of Gods vengeance in those days, was made up by those flattering preaching Friers. But Parliaments, Palaces of Princes and Pulpits should be free from adulation and flattery.

Anno 5 R.2. Th.Wals.p.281.

Read the story, and see the most lamentable estate of those times. Note those three P P P.

CAP. C.

Of false Imprisonment.

SEE the Second part of the Institutes, the statute De 1 E.2. de frangentibus prisonam, and the exposition upon the same.

See the Petition of Right, 3 Car. Regis, and Mag. Carc. ca. 29. And it is to be observed that before the Conquest it was thus provided. Qui hominem Paganum immerentem vinculis constrinxerit, 10 solidis noxiam sarcito; cum si verberibus affecerit, 20 solidorum pœna esto; si suspensum in sublime rapuerit, 30 solidis culpa pensatur; si contumelioſe capillum ejus morionis in morem tonderit, 10 solid' præstato; si caput in morem sacerdotis raserit, nec ipsum ligaverit, 30 solidos numerato; si barbam illi resecarit, 20 solidorum compensatio sequitor; si denique ei vinculis constricto capillos in morem sacerdotum abraserit, 60 solidos pendito.

Int.leges Alvredi cap.31.

By way of addition, here it is necessary to be known, how and by what means one that is in prison may be discharged. Every man that is in prison, either is imprisoned without lawfull Mittimus (whereof we have spoken before ubi supra, and how he may be freed from imprisonment in that case) or with lawfull Mittimus. He, that is lawfully imprisoned, is either imprisoned by lawfull commandement, and order or warrant, or by the Kings Writ: By commandment and order of any Court of Record; and this commandment, warrant or writ is either for causes not being treason or felony, misprision of the same, nor other publique offence or cause, or inferiour causes to these; as contempts, private actions or suits. If any court of Record commit a man for a contempt done in Court, they may discharge him by like order at their pleasure: but if they having authority, doe commit him for treason, felony, or other crime, or for suspition of the same, they cannot discharge him, untill he be enquired of, and either indicted & acquited, or an Ignoramus found, and delivered by proclamation. [a] And so if it is if any be taken and imprisoned by lawfull warrant, or the Kings Writ for treason, felony, or other crime, &c. he cannot be discharged by any without legall proceeding (but by the King only.)

[a] For bailment See the statute of Mag. Cart. ca. 29. W.2. ca. 15. and the exposition thereof. 1 & 2 Ph. & Mar. ca. 13. 2 & 3 Ph. & Ma. cap. 10.

[b] If a Vagrant, refusing to serve, had been committed to prison upon the statute of 23 E.3. of Labourers by the Lord of the town, or Justice of Peace, they might have discharged him, even as the Chancellour, &c. may commit a man for a contempt before him in Court, and discharge him again at his pleasure.

[b] 14 H.6.8.F.N. B.167.b. See 12 H.6.3.

[c] If a man be taken by the Kings Writ in an action of debt or another private action, the Plaintif may discharge the Gaoler of him, and set him at liberty, though he be in execution: but if he be taken in an appeal of Death, Robbery, Rape,

[c] Mich.13 Jac. in banke le Roy. Int. Withers & Herly, adjudge accord. 27 H.8.28.b. 1 R.2.ca.12. 10 H.7.3.a.per Vavasor. 13 E.3. Bar.253.

Rape, &c. the Plaintif cannot diſcharge him, becauſe it is a publique offence, wherein the King hath an intereſt, and he may after Nonſuit by the Plaintif be arraigned at the Kings ſuit.

There are two great adverſaries to the due execution of theſe laws (as before hath been touched) eſpecially in criminall cauſes, viz. Præcipitatio, & morosa cunctatio. Precipitation; as a man or woman to be committed to priſon, and within ſo ſhort a time to be indicted and arraigned, as it is not poſſible for them to ſend for, or procure their witneſſes; this certainly is precipitation, for the law both in reall and perſonall actions doth give the party Tenant or Defendant a convenient time without reſpect of perſons to anſwer, &c. much more it ought to be in caſe of life, Nec unquam in judiciis tantum eminet periculum, quantum parit proceſſus feſtinatus: and again, Crebro in deliberationibus judicia matureſcunt, in accelerato proceſſu nunquam, and ſpecially in caſe of life. As for morosa cunctatio, froward or wayward delay; ſee the Second part of the Inſtitutes Glouc. ca. 29. And we will conclude this chapter with the rule of law, Quòd in criminalibus, probationes debent eſſe luce clariores.

Forteſcue ca. 53. fo. 127. b.

CAP. CI.

Of Judgements and Execution.

Iudicium is derived à Jure, & dicto, et eſt quaſi Juris dictum, and therefore if the judgement be erroneous, both the judgement and execution thereupon, and all the former proceedings ſhall be reverſed by writ of Error: but if the former proceeding and judgement be good, if the execution be erroneous, the execution ſhall only be reverſed: and becauſe the judgement is the guide and direction of the execution, we ſhall treat principally of the Judgement, and incidently of Execution.

Of Judgements, ſome be by the Common law, and ſome by Statute law, and ſome by Cuſtome.

Of Judgements by the Common law, ſome be in criminall cauſes, or Pleas of the Crown, concerning the life of man (whereof we are principally to intreat,) and of theſe ſome be expreſſed, and ſome implied. Other judgements at the Common law be in actions reall and mixt, of which, ſome be Judicia interlocutoria, and ſome ultima ſeu principalia: and again, de principalibus, quædam ſunt finalia, & quædam non ſunt finalia. Of judgements by Statutes, ſome be in criminall cauſes, and ſome in Common pleas: but judgements by Cuſtome are only in Common pleas.

All Pleas of the Crown, concerning the life of man, are divided into treaſon and felony; and treaſon, into High treaſon, and Petit treaſon; and felony into all the ſeverall branches abovеſaid. And as in the caſe of High treaſon, (as it hath before appeared) ſome be far more horrible & odious then other, yet (one caſe excepted, as before hath appeared) one & the ſame judgement is given for all. So in caſes of Petit treaſon, one judgement is given in all, nay in all the ſeverall caſes of felony, though ſome be far more hainous then other, yet all being but felony, one and the ſame judgement is given. See the judgement and forfeiture in caſes of treaſon, felony, &c. in the ſeverall titles thereof, theſe we will adde.

6 El. Dier. 230. See before in the chapter of treaſon.

Judgement in High Treaſon.

Pl. Com. 387. b. See Stanford 182. d. c. Lib. Int. Co. 361.

Et ſuper hoc viſis, & per curiam hic intellectis omnibus & ſingulis præmiſſis, * conſideratum eſt, quòd prædictus R. uſque furcas de T. 1 trahatur, & 2 ibidem ſuſpendatur per collum, & vivus ad terram proſternatur, & 3 interiora ſua extra

* See the book of Judges cap. 19. ver. ult. Conſider, conſult, and give ſentence. 19 H. 6 47. Trahe, pende, & diſcloſe. Bract. li. 3. fo. 118. b. *Crimen læſæ majeſt. ut ſi contra perſonam ipſius regis ſit præſumptum, quod quidem crimen omnia alia crimina excedit quoad panam.* Idem l. 3. f. 104. b. maketh mention of execution, *laqueo & ſecuri*, Parliam. 21 R. 2. inter placita Coron. nu. 50.

ventrem

ventrem ſuum capiantur, 4 ipſoque vivente comburantur, & 5 caput ſuum amputetur, quodque 6 corpus ſuum in quatuor partes dividatur, ac 7 quod caput & quarteria illa ponantur, ubi dominus rex ea aſſignare vult.

Implied in this judgement is, Firſt, the forfeiture of all his Honors, Lands, Tenements, and Hereditaments in fee-ſimple, or fee-tail, of whomſoever they be holden. Secondly, his wife to loſe her Dower. Thirdly, he ſhall loſe his children (for they become baſe and ignoble.) Fourthly, he ſhall loſe his poſterity, for his blood is ſtained and corrupted, and they cannot inherit to him, or any other Anceſtor. Fifthly, all his goods and chattels, &c. And reaſon is, that his body, lands, goods, poſterity, &c. ſhould be torn, pulled aſunder, and deſtroyed, that intended to tear, and deſtroy the majeſty of government. And all theſe ſeverall punihments are found for treaſon in holy Scripture. 35 H.8.Br.Forfeiture.99.

1 Reg.2,28.&c. Ioab tractus,&c. Drawing.

Eſther 2, 22,23. Bithan ſuſpenſus,&c. Hanging.

Acts 1,18. Iudas ſuſpenſus crepuit medius, & diffuſa ſunt viſcera ejus. Bowelling.

2 Sam.18.14,15. Infixit tres lanceas in corde Abſolon cum adhuc palpitaret, &c. The heart, &c. while he lived.

2 Sam.20.22. Abſciſſum caput Sheba filii Bichri. Beheaded.

2 Sam.4.11,12. Interfecerunt Baanan & Rechab, & ſuſpenderunt manus & pedes eorum ſuper piſcinam in Hebron. Quarters hanged up.

Corruption of blood, and that the children of a Traitor ſhould not inherite, appeareth alſo by holy Scripture. Damnatæ memoriæ.

Pſal. 109. 9,10,11,12,13. Mutantes transferantur filii ejus, & mendicent, & ejiciantur de habitationibus ſuis, Et diripient alieni labores ejus, & diſpereat de terra memoria ejus. 25 E.3.42.b. Coron.130. Brit.ca.8.f.16.b. accord.

[a] The judgment of a woman for High treaſon is to be drawn and burnt.

[b] Sir Andrew Harkley Earl of Carliſle, convicted, degraded and attainted of treaſon. *b Degradition.* Hil.18 E.2.Coram Rege Rot. 34,35. Walſingh. p.118.

Iudgment in Petit treaſon, where he is convicted thereof by verdict or confeſſion.

Super hoc viſis, &c. ut ſupra, Conſideratum eſt, quod prædictus R. uſque furcas de T. trahatur, & ibidem ſuſpendatur per collum, quouſque mortuus fuerit. 19 H.6 47. Com.Cæſar.ante Chriſtum natum 1600 annis, what the Judgement was for Petit treaſon. 1 R.3.f.4. 25 E.3.42. 12 Aſſ.30.

But a woman is to have judgement to be drawn and burnt, as well in caſe of Petit treaſon, as High treaſon, and ought not to be beheaded, or hanged. De morte mariti ſi compertum eſt uxorem, &c. igne Britanni interficiunt.

Bracton li.3,fo.105. a. Igne concremantur qui ſaluti dominorum ſuorum inſidiaverint, idem fo.104.b.

Iudgement in felony, where he is convicted thereof by verdict or confeſſion.

Et ſuper hoc viſis, &c. ut ſupra, Conſideratum eſt quòd prædictus R. ſuſpendatur per collum, quouſque mortuus fuerit. Bracton lib. 3. fo.104.b. ſpeaketh, De laqueo. 6 E.4.4.2.& b. See the Preface to the firſt part of Reports, what the law was before the Conqueſt Anno Dom.995. in caſe of felony.

And it is a maxime in law, that execution muſt be according to the judgement, Ea quæ in curia noſtra rite acta ſunt, debit' executioni demandari debent: * and for preſſe authority, non licet felonem pro felonia decollare; and yet ſome examples are to the contrary. * Paſch. 20 R.2. Coram Rege, Rot.1.Lincoln.

True it is that the Lord of Hungerford of Heytesbury was in 32 H.8. attainted of Buggery, and had judgement to be hanged by the neck, untill he was dead; and yet on the twenty eight day of July in the ſame year was beheaded at the Tower hill. But as true it is, that Thomas Fines Lord Dacres of the South, in Anno 33 H.8. was attainted of murder, and had judgement to be hanged by the neck, untill he was dead, and according to the judgement was hanged at Tiborn the twenty eight of June in the ſame year. And true it is, that Edward Duke of Somerſet was attainted of felony in Anno 5 E.6. and had judgement to be hanged by the neck untill he was dead, and on the twenty ſecond See before cap. Murder.

cond of Febʒuary in the ſame yeaʒ was beheaded at the Tower hill. And as tʒue it is, that 3 & 4 Ph. & Mar. the Lord Stourton was attainted of muʒdeʒ, and had judgement to be hanged by the neck, untill he weʒe dead, and accoʒding to the judgement, the fiʒſt of Maʒch in the ſame yeaʒ was hanged.

In caſe of High treaſon, beheading is paʒt of the judgement, and theʒefoʒe the King may paʒdon all the reſt ſaving beheading, as is uſually done in caſe of Nobility. But if a man being attainted of felony, be beheaded, it is no execution of the judgement, becauſe the judgement is, that he be hanged, untill he be dead. In this caſe the judgement doth belong to the Judge, and he cannot alter it, the execution belongs to the Sheʒif, &c. and he cannot alteʒ it. And if the execution might be altered in this caſe, fʒom hanging to beheading, by the ſame ʒeaſon it might be altered to buʒning, ſtoning to death, &c. To conclude this point, Judicandum eſt legibus, non exemplis, and Judicium eſt Juris dicti, & Executio eſt executio Iuris ſecundum Iudicium.

The foʒfeiture in caſe of Petit treaſon and felony (which is implied in the judgement) is all one, which you may ʒead in the Fiʒſt paʒt of the Inſtitutes, Sect. 747.

Deut. 2. 13. Vide Hil. 1 H. 5. Rog. Actons caſe.

Quando peccaveʒit homo, quod moʒte plectendus eſt, & adjudicatus moʒi appenſus fueʒit in patibulo, non peʒmanebit ejus Cadaveʒ in ligno, ſed in eadē die ſepelietuʒ. And the ʒeaſon that Divines yeeld heʒeof is, foʒ that by the execution of the judgement by death, the law is ſatiſfied, and abhoʒʒeth cʒuelty, and in that caſe, Moʒs dicituʒ ultimum ſupplicium.

And heʒein this is obſeʒvable, that in Tʒeaſon and Felony, the judgement is only of the fatall and coʒpoʒall puniſhment, and nothing of the foʒfeiture, which is implied, but in Common Pleas the judgements aʒe moʒe paʒticulaʒ.

Iudgement in Appeal, when the Defendant joyning battail is vanquiſhed in the field, &c.

8 E. 3. Judgement, 225.

If the Defendant in Appeal be vanquiſhed in the field, the Recoʒd ʒeciteth the vanquiſhing in the field. Ideo conſideratum eſt, quod ſuſ. peʒ coll. and ſo it is when the Defendant is vanquiſhed and ſlain in the field, yet the judgement is ut ſupʒa. Otheʒwiſe theʒe ſhould be no eſcheat: ſee the Second paʒt of the Inſtitutes, W. 1. ca. 14.

Iudgement in Treaſon or Felony, wherein neither any coʒpoʒall puniſhment oʒ foʒfeiture is expreſſed.

Regiſt. 164. b. Fecit feloniam pro qua utlagatus fuit.

In caſe of Tʒeaſon oʒ Felony, if any peʒſon be outlaweʒ, the judgement upon the Exigent at the fiʒſt County Couʒt upon default of the paʒty is, Ideo, &c. peʒ judicium Coʒonatoʒis domini Regis comitatus pʒædict' utlagatus eſt. Which wʒit being duly ʒetuʒned of Recoʒd by the Sheʒif, the paʒty ſhall have the like coʒpoʒall puniſhment, and ſhall loſe and foʒfeit as much as if he had appeaʒed, &c. and judgement had been given againſt him in caſe of tʒeaſon oʒ felony ʒeſpectiveʒly. And note that in theſe woʒds (ideo utlagatuʒ) both the coʒpoʒall puniſhments and foʒfeiture alſo aʒe implied: and if the pʒoceeding theʒein, oʒ the judgement be eʒʒoneous, and upon his appeaʒance upon the Capias utlagatum, if it appeaʒ to the Couʒt (whʒeof any man, as amicus cuʒiæ, may infoʒm the Couʒt) that the paʒty may eitheʒ avoid the outlawʒy againſt him by wʒit of eʒʒoʒ, oʒ by plea, the Couʒt ought not to awaʒd execution againſt the paʒty, but aſſign him oʒ heʒ councell leaʒned, and ʒequiʒe him oʒ heʒ by theiʒ advice, eitheʒ to bʒing a wʒit of eʒʒoʒ oʒ plead: but if the paʒty ʒefuſe to bʒing his wʒit of eʒʒoʒ oʒ plead afteʒ convenient time be given, if the utlawʒy be eʒʒoneous and not void, the Couʒt may awaʒd execution. And ſo it was ʒeſolved, Teʒmino Hil. Anno 3 Jacobi Regis, by the whole Couʒt in the Kings Bench, and diveʒs pʒeſidents theʒeof ſhewed in the ʒeigns of H. 6. E. 4. and one in the ʒeign of Queen Eliz. which we ſaw; foʒ as long as the attainder by outlawʒy ſtandeth in foʒce, the paʒty outlaweʒ cannot be dʒawn in queſtion by any new indictment oʒ appeal foʒ the tʒeaſon, oʒ felony, foʒ the which he was outlaweʒ; foʒ Auteʒfoitz attaint

19 H. 6. 2. a. Error Fi. 26. 28 E. 3. 91. a. 6 H. 4. 6. 9 H. 7. 19. b.

Hil. 3. Ja. Coram Rege peʒ cuʒiam.

Auteʒfoits attaint de meſme le offence.

attaint for the ſame offence is a good plea to free him from anſwer in that cauſe, albeit the Record be erroneous. But if the Attainder or Outlawry be void againſt him, then may he be either arraigned upon the former indictment, or appeal, or newly indicted, &c. if there be cauſe. And therefore the Iudges are to take due conſideration of the whole Record of the Attainder or Outlawry, that they may be truly informed of the true ſtate of the cauſe, before they award execution of death againſt him upon the outlawry. Read Bracton lib. 3. Tract. 2. cap 14. and Britton cap. 13. fo. 20, 21. excellently treating hereof, and Fleta lib. 1. cap. 27.

Vide 6 E. 3. 55. in Aiel. 12 E. 2. Eſch. 14. 19 E. 2. Cor. 387.

Bract. li. 3. f. 131. Britton fo. 20, 21. Fleta li. 1. ca. 27.

And by the Common law Auterfoitz attaint, &c. of the ſame felony was a good plea as well in an Indictment as in Appeal by the Common law. See the ſtatute of 3 H. 7. cap. 1. concerning appeal of death: ſo as in an appeal of death, at the ſuit of the party, Auterfoitz attaint de meſme le mort, is no plea at this day, but in caſe of an Indictment of death at the ſuit of the King, Auterfoitz attaint de meſme le mort in appeal is a good plea. Auterfoitz attaint de murder is a good plea to an indictment, &c. of Petit treaſon of the ſame death, for in effect it hath the ſame judgment, and the ſelf ſame forfeiture. So likewiſe if a man be attainted of manſlaughter, it is a good bar to an indictment of murder of the ſame death, & è converſo.

Auterfoitz attaint dun auter offense.

By the Common law if a man were attainted of a felony done by him, and admitting he were after pardoned, he cannot at the ſuit of the King be impeached for any felony whatſoever before his ſaid Attainder by him committed, for by the Attainder he was mort in ley; and in that caſe he had the judgement due for felony, viz. Suſ. per coll. But the party may have his Appeal of Robbery, for a robbery done before the felony, whereof he was attainted, becauſe in the Appeal he is to have reſtitution of his goods, beſides judgment of death. *And if the party attainted of felony had committed High treaſon before his Attainder, he ſhall anſwer to the treaſon notwithſtanding his Attainder of felony, becauſe the King by the treaſon was intitled to have the forfeiture of all his lands, of whomſoever they were holden. Alſo for High treaſon there is another judgement, being an offence of an higher nature: but being attainted of felony, if he commit treaſon afterwards, he ſhall anſwer thereunto, becauſe it is of higher nature then the felony, but it ſhall not deveſt the right of Eſcheat, which lawfully was by the felony veſted in the Lords, contrary to the opinion of Iuſtice Stanford in that caſe, for the act and offence of the party ſhall not deveſt the lawfull Eſcheat of the Lords: but if a man be attainted of treaſon, he cannot be after attainted of a former treaſon, cauſa qua ſupra.

28 E. 3. 90. b. Dier 4 Eliz. Stones caſe. 6 H. 4. 6. 10 H. 4. Coron. 237. 6 E. 3. Cor. 394. 22 E. 3. Cor. 471. Stanf. f. 107, 108. See 44 E. 3. 44. 7 H. 4. 31. 4 E. 4. 11. * 1 H. 6. fo. 5. Ror. Par. 3 R. 22 nu. 18. Jo. Imperials caſe.

Where a little before it is ſaid, that a felon by his Attainder is mort in ley, it is to be underſtood of ſuch former offences as require pœnam mortis: for notwithſtanding the Attainder, his body remains ſubject to arreſts and execution for debts, &c. Vide hic paulo poſt, Troſſels and Preſtals caſe in margine. Albeit for felony a man be adjudged to his penance, Pain fort & dure, yet he may be impeached for any former felony, becauſe the judgement is not given for the felony, but for his contumacy.

Dier 14 El. 308. Cobhams caſe.

If a man be attainted of Petit Larceny, he may be after attainted of a felony, for the which he ſhall have judgement of death, becauſe it is an higher offence, and is to have an other judgement.

Auterfoitz acquite, and the Iudgement thereupon.

But Auterfoitz acquite, muſt be of the ſame felony, and albeit he be acquit of the latter felony, yet may he be arraigned of any former felony: and ſo it is in caſe of treaſon, Auterfoitz acquite of treaſon muſt be of the ſame treaſon, for it acquiteth no other, becauſe he ever remained a perſon able.

See Stanf. 105. a. & b. &c.

And albeit at this day in an appeal of death, Auterfoitz acquite, upon an indictment of the ſame death is no bar, yet in an indictment of death, auterfoitz attaint de meſme le mort in an Appeal is a good bar.

3 H. 7. ca. 1. 15 E. 3. Tit. Coron. 116.

In an Indictment or Appeal of death, if it be found that he killed him in

15 Aſſ. p. 7.

his own defence, he is acquited of the felony for ever.

Lib.4.fo.44.45. It appeareth in Vauxes case, that if a man be erroneously acquited of felony by verdict and iudgement thereupon given, yet if the Indictment, &c. be insufficient, he may be indicted againe for the reasons and causes in that case reported, which you may reade there at large, and need not here be repeated: And thereunto this we will adde, that the reason, wherefore upon an erroneous iudgement of condemnation, the party (as hath been said) is driven to his Writ of Error, and in the case of an erroneous iudgement of acquitall, that no Writ of Error needeth to be brought by the King, but the offendor may be newly indicted, &c. is this, that in the case of condemnation, the iudgement is, Quod suspendatur, &c. which is the iudgement of law due for the offence, and ought to be given therefore, and can have no other intendment: but in the case of Acquitall the iudgement is, Quod eat sine die, &c. which may be given as well for the insufficiency of the indictment, as for the parties innocency, or not guiltinesse of the offence. And the Iudges of the cause ought before iudgement to look into the whole Record, and upon due consideration thereof to cause it to be entred, Ideo consideratum est quod eat sine die; which upon that report, and this addition implied therein, we hold may satisfie the studious reader.

And so it was adjudged Mich. 33 & 34 Eliz. coram Rege, in an Appeale of death between Katherine Wrote and Tho. Wigges.

Vid.19 E.3.Barre 444.

Vi.3 H.4.fo.3.11

Auter foits convict de meſme le felony devant iudgement.

Lib.4.fo.45.46. Holcrofts case. Second part of the Institutes, Art.ſuper cart. cap.3. Lib.Intr. Co.53, 54, &c. Lib.4.fo.40.Wetherels case. Stanf.lib.2.ca.37

For this division see Holcrofts case before in the Chapter of Murder, and Lib. 4.fo.45.46. where the statute of 3 H.7. cap.1. is well expounded: and the second part of the Institutes Artic, ſuper Cart. cap.3. & Lib.Intr. Co. fo.53,54, &c. and Lib.4. fo.40. Wetherels case. And Stanford Lib.2. cap.37. in pl. coron.

* Auter foits convict. dun auter felony.

* Before the statutes of 8 Eliz. cap.4. and 18 Eliz.ca.6. If a man had committed divers felonies, if he had been indicted of the last, and had benefit of his Clergy, he could not have been impeached for any of the former felonies, albeit for the same he could not have had his Clergy: by that Act it is provided, that notwithstanding the allowance of such Clergy, he may be impeached for any former offence, for which he could not have had his Clergy.

25 E.3.cap.5.pro Clero.

Iudgement to reverse an Outlawry for treason or felony.

Vid.Paſc.39 E.3. Rot.95. Scire fac. Dominis mediatis & immediatis.

The iudgement to reverse an Outlawry of A. B. in case of treason or felony in a Writ of Error is: Ideo consideratum est quod utlagaria prædicta ob errorem prædict' & alios in recordo & proceſs' prædict. compert', revocetur, adnulletur, & penitus pro nullo habeatur, & quod prædict. A.B. ad communem legem & omnia quæ occasione utlagariæ prædict. amisit, restituatur, &c. & quod ipse eat sine die.

If the Outlawrie be avoided by plea, then the iudgement is, Ideo consideratum est quod prædictus A.B. de utlagaria prædicta exoneretur, & quod ipse ad communem legem, & omnia, quæ occasione utlagariæ prædict. amisit, restituatur, & ea occasione non moleſtetur in aliquo, nec gravetur, sed sit, & eat inde quietus.

If A.B. be indicted of treason or felony in the Kings Bench, or if he be indicted before Commissioners of Oier and Terminer, or any other, & the Indictment of treason or felony is removed into the Kings Bench: and by Proces out of the Kings Bench he is erroneously outlawed and so returned, a Writ of Error may be brought in the Kings Bench for reverſall thereof.

And where it is holden by some, that if any person be attainted of High Treason by the Common law, that no Writ of Error should be brought for the reverſall of that attainder by reason of these words of the Statute of 33 H.8.cap.20. *viz.* And if any person or persons shall be attainted of High Treason by the course of the Common law, &c. that every such attainder by the Common law shall be of as good strength, value, force, and effect, as if it had been done by authority of Parliament. But the contrary hereof was resolved at a Parliament holden Anno 28 Eliz. that a Writ of Error should be maintained for the reverſall of erroneous attainders of High Treason by the Common law: for that statute of

Stanf.pl.cor.18. k.1.

33 H.8.cap.20.

33 H.

33 H. 8. is to be intended of lawfull attainders by the due course of the Common law, and not of erroneous or void attainders. And thereupon at that Parliament holden anno 28 Eliz an Act was made, That no Record of attainder of any person or persons, of or for any High Treason, where the party so attainted * is or hath been executed for the same treason, shall be, &c. in any wise hereafter reversed, undone, avoided, or impeached by any plea, or for any error whatsoever.

* And albeit judgement be given against a man in case of treason or felony, yet his body is not forfeited to the King, but untill execution remains his own. And therefore before execution, [a] if he be slain without authority of law, his wife shall have an Appeal; for notwithstanding the attainder he remained her husband. And after such attainder his body may at the suit of a Subject be taken in execution upon a judgement or statute, &c. And he may be executed for treason or felony, notwithstanding such execution had against him. And in an Action of debt, or other Action brought against a person attainted, he cannot plead the attainder, and demand judgement, if during the attainder he shall be put to answer: [b] for upon consideration had of the books in 11 Ass. 27. 2 E. 4. 1. 4 E. 4. 8. 6 E 4. 4. 6 H. 4. 6. 8 Eliz. Dier 245, &c. [c] it was adjudged that the person attainted should not plead the said plea, but should be put to answer. And there is a great diversity between an attainder of treason or felony, and an entry into Religion; for he that is attainted of treason or felony hath capacity, and [d] may purchase lands to him and his heirs, [e] but so cannot he that is entred into religion. And it is against a rule in law, that any man of full age should be received in any Plea by the [f] law to disable his own person, [g] or take advantage of his own wrong. And if the person attainted be beaten or maimed, or a woman attainted be ravished, after pardon, they shall have an Action of battery, Appeale of mayme, or Rape. See Lib. Intr. Co. 247, 248.

[h] In ancient time a man indicted or appealed of life or member, or imprisoned, &c. should not be compelled to answer at other mens suits, but (as before it appeareth) these opinions have been justly changed.

[i] There was a notable case adjudged in the Kings Bench Mic. 26. & 27. Eliz. wherewith I was well acquainted concerning the matters of outlawry and errors before spoken of, which was in effect as followeth.

Ninianus Menvile nuper de Stedwich in Com' Dunelm ar' Anno 1 & 2 Ph. & Mar. was indicted in the Kings Bench of High Treason, and upon Proces he was outlawed, and so returned, and his daughter and heire brought a Writ of Error in the Kings Bench, wherein two errors were assigned. 1. That before the Exigent the 2 Capias with a Proclamation was awarded to the Sheriffe of the County Palatine of Durham, where it ought to have been directed to the Chancellour of that County. [k] For that point 30 H. 6. 6. 36 H. 6. 35. 1 E. 4. 10. the book of Entries Rast. fo. 52. Stanf. pl. cor. 68, 69. & 70. Vid. 19 H. 6. 2. 31 H. 6. 11. but the Court gave no opinion concerning this Error. The other Error that was assigned, was that the Sheriffe returned upon the said Capias, that at his Court holden at the City of Durham the eight day of July in the second and third years of the reigne of King Philip and Queen Mary he made the Proclamation, &c. and there were no such years: for Queen Mary began her reigne the 6 day of July, and the 25 day of July in the 2 year of her reign she maried King Philip: so as between the 2 day of July, and the 25 day of July, the Queen wrote two years before the King. And therefore there could be no such years as 8 July Anno 2 & 3, but should have been 2 & 4. And so was the clear opinion of the whole Court. But then it was objected, that by the said Act of 35 H. 8. and Stanfords opinion thereupon, that the attainder by outlawry being an attainder by the Common law, it could not be reversed by Writ of Error, for that the said Act of 35 H. 8. was to be intended of lawfull attainders: And after great deliberation the outlawry of treason was reversed. And I take it, it shall not be altogether impertinent, sure I am it shall not be unprofitable, to report the consequent of this reversall. In the nert Terme, sc. Term. Hil. anno 27 Eliz. for that Queen Eliz. had the lands whereof the said Ninian was seised in fee: his wife

* Nota, this Act extends only to attainders of treasons before the Act of 28 El. where the party hath been executed, and not to attainders of treasons afterwards.

[a] what interest the King hath in the body of the attainted before execution.

[a] 35 H. 6. 63.

[b] See Britton, ca. 122. Fleta lib. 6. cap. 6. 7.

[c] Mich. 38 & 39 Eliz. in cõi banco Int. Banister & Trussel attaint de felony. Vide Mich. 33 & 34 Eliz. coram Rege Rot. 532. Int. Ognel & Trussel. Mic. 32 Eliz. inter Wade plaintife, & Prestal defendant attaint de haut treason; corã Rege. Vid. sup.

[d] See the first part of the Institutes Sect. 1.

§ Car si home purchase.

[e] Ibid. Sect. 199. 200. mort in ley.

[f] First part Inst. Sect 405.

§ 45 E. 3. 7. a. 18 E. 4. 25. 15 E. 4. 5. a. &c. Lit. b Britt. ca. 12. a.

§ Encusement de crime. Fleta lib. 6. c. 6, 7, &c.

[i] Mic. 26 & 27 El. Ninian Melvins case in the Kings Bench in Bre de Errore.

[k] See the Stat. of 8 H. 6. cap. 10.

Hil. 27 Eliz. in Filacis Cancellariæ.

by petition of right, which comprehended the title of the wife, and the title of the Queen, claimed her dower, which in effect was this: That her husband was seised of certain lands in fee, and took her to wife; and before his treason committed Anno 1 Mariæ levied a Fine with Proclamation to another, whose estate the Queen had by lawfull conveyance therein expressed: and that afterward her said Husband was attainted of High Treason by outlawry, ut supra, and died in anno 4. Eliz. which outlawry was the last Terme reversed in a Writ of Error, as is aboveſaid: which Petition being indorsed by the Queen, Soit droit fait al partie, and delivered into the Chancery, Sir Thomas Bromley a man of great gravity and judgement in law, then being Lord Chancellor of England, by advice of all the Judges resolved these Four points following. First, that the petitioner need not to have any office to finde her title, because her title standeth with the title of the Queen, and the Queen is not intitled by office (which she might traverse, or confesse and avoid) but by conveyance, which she affirmeth. Secondly, that a Fine with Proclamations, and five years past after the death of the Husband doth bar the wife of her dower, and that the conusee shall take advantage thereof, and of the attainder also. Thirdly, that albeit five years and many more in this case were past since the death of her husband, yet the said fine with Proclamations did not bar her; because as long as the said attainder of treason stood in force, she was barred of her dower, and could not have any remedy, or pursue her title, untill the outlawry were reversed, and then her title of dower did first grow due unto her, and therefore she might within five years after the reversall of the said outlawry, pursue her title by the expresse words of the saving of the Act of 4 H.7. Fourthly, albeit an attainder reversed by a Writ of Error, is as concerning restitution to the party by relation from the beginning become of no force, [a] and the Record so adnihilated thereby, as Nul tiel Record may be pleaded thereunto: yet this relation shall never work a bar, and consequently a wrong to a stranger, but that the truth of the matter may be shewed, viz. the Record, and the reversall of the same: and the rather (as some said) because the wife could not have any Writ of Error to reverse the outlawry, [b] so as she had no mean to pursue her right so long as the outlawry remained in force, which it did, untill it was reversed by error. But admit the wife had been (in a remote degree of consanguinity) heir to her husband, so as she might within five years after the death of her husband have had her Writ of Error after the death of her husband to reverse the outlawry, and to enable her selfe to pursue for her dower, and reverseth not the outlawry within the five years: I hold in this case that she shall have five years after this reversall, and that within the said saving of the statute of 4 H. 7. for then did her title of dower (as hath been said) first grow unto her, * and it was not in her power to reverse the outlawry when she would. And in this Term of S. Hillary, Popham Attorny Generall, according to the said resolution of the Lord Chancellor and Judges, confessed the Petition to be true; and thereupon Judgement was given, that she should be indowed, and was indowed accordingly.

Vide Lib.2.fo.93 Bingham's case. See the first part of the Institutes. Sect. 55.

4 H.7.cap.24.the first saving.

[a] 26 E.3.75. 4 H.7.fo.22. & 11.12. 38 H.6.4 & 12. 21 E.4.23. Dier 29. H.8.fo.32.pl.8. idem. 6 Eliz.228.pl.45. 3 Eliz.fo.188. pl. 8. a. Lib.8.fo.42.43.b Dr.Druryes case.

[b] 34 H.6.fo.2.

* Nota.

[c] By the statute of 26 H.8.and 5 E.6. it is enacted, that all Proces of outlawry against any offenders in treason, being out of the Realm, or beyond the seas, at the time of the outlawry pronounced, shall be as good and effectuall as if the offenders had been within the Realme at the time of the outlawry pronounced. See the said Statute of 5 E.6. cap. 11. that, if the party outlawed shall within one year after the outlawry pronounced, yeild himselfe to the Chief Justice of England, and traverse the said indictment, &c. and thereupon be found not guilty by verdict, he shall be cleerly discharged of the said outlawry.

[c] 26 H.8.cap.13. 5 E.6.cap.11. These statutes not only extend to all treasons by the statute of 25 E.3. by the Common law, but by any other statute. Vi. Dier 12 Eliz. fo.287. accord. First part of the Institutes, Sect. 479.

Judgement in case of abjuration for felony, whiles it was of force.

After the flying of a felon for any kinde of felony whatsoever, Sacriledge excepted, (but in case of High Treason or Petit Treason a man could never abjure, because the Coroner is not allowed by law to be a Judge of those heynous crimes) into a Church, &c. for safegard of his life: and upon his prayer of a Coroner,

Coroner,[a] and his voluntary and particular confeſſion of the felony before the Coroner, naming the certain time, the iudgement was, Idem A. petiit de præfato Coronatore regnũ dom̃ Regis Angliæ abjurare: Super quo tradito[b] ei libro p̃ præfat' coronatorẽ, idem A. regnũ prædict' corã præfato coronatore p̃dict' die, &c. in eccleſia prædicta abjuravit, in idem regnum nunquam rediturus abſque ſpeciali licentia, & reconciliatione regis Angliæ, & aſſignatus eſt eidem A. pro tranſitu ſuo extra regnum prædictum Portus de Yarmouth[c] Cruce in manu ſua dextra poſita, prout lex Angliæ eſt & conſuetudo. Nothing is expreſſed in this Iudgement but abjuravit regnum, but therein is implied, that all his lands, which he had at the time of the felony committed,[d] (and therefore the time of the felony was ſet down in his confeſſion particularly) or at any time after, eſcheated to the Lords of the fees, and forfeited to the King all his goods which he had at the time of his attainder,[e] the time whereof alſo was expreſſed certainly, and his blood corrupted, and other incidents, as in other attainders of felony, only by his voluntary and particular confeſſion. In this caſe for the offence of felony, he ſaved his life ſo long as he kept himſelf extra regnum, but if he returned, then under this word [abjuravit] is implied Suſ. per collum. Mich. 1 R. 2. Rot. 1. Bedf. rediit & ſuſpend. See the Firſt part of the Inſtitutes, Sect. 200. fo. 132, 133. and the Second part of the Inſtitutes, W. 1. ca. 20. verbo, [Forejure le Realm.] Artic. Cler. cap. 10. & 15. And the law was ſo favourable for the preſervation of Sanctuary, that if the Felon had been in priſon for the felony, and before attainder or conviction,[g] had eſcaped and taken Sanctuary in Church or Church-yard, &c. and the Gaolers or others had purſued him, and brought him again to priſon, upon his arraignment he might have pleaded the ſame, and ſhould have been reſtored again to the Sanctuary: See more concerning Abjuration, Mic. 9 E. 3. Coram Rege Rot. 84. extra legem poſitus, &c. To conclude this Iudgment of Abjuration, we take it, that for felony[h] Abjuration is utterly taken away. For abjuration of Recuſants and of Hunters in Parks, &c. we have given but a light touch, becauſe they belong not to our treatiſe of the Pleas of the Crown, nor have we ſpoken any thing of abjuration in caſe of Hereſy, quia ſpectat ad aliud forum.

Thus have we ſpoken of judgments, and attainders in caſes of high treaſon, upon verdict, confeſſion or nihil dicit, and by outlawry: in caſe of Petit treaſon, upon verdict, confeſſion, or by outlawry: and in caſe of felony, upon verdict, or confeſſion, or by outlawry, or by abjuration; for none can be attainted of Petit treaſon or felony upon a nihil dicit, or refuſall to anſwer, but in that caſe the Delinquent is to have his puniſhment of Peine fort & dure, which next falleth to be handled.

a 6 E. 3. 53. in Ajell Malloms caſe. 12 E. 2. eſche. 14. Tr. 21 E. 1. Corã Rege 42. ſi niſe.

b Hereupon it was called abjuration, becauſe he was ſworn to depart the Kingdome. See the Oath. Vet. Mag. Cart. 1. pte f. 167, 168.

c That he might be known to be an abjured perſon, and not be let, or hindred in his journy. Et Crux fuit ſignum ſervatæ vitæ per eccleſiam, and is ſometime called vexillum Sanctæ Eccleſiæ.

Hil. 26 E. 3. Co. 1ã Rege Rot. 20.

d Pl. Com. f. 262. a. in Dame Hales caſe. Regiſter fo. 164. b. Feeit feloniam pro qua regnum noſtrum abjuravit.

e Stanf. Pl. Cor. 117. E. 6 E. 3. 55. in Aiell Malloms caſe. 12 E. 2. Eſch. 14. 6 E. 2. Forf. Br. 121. 6 H. 4 6.

f Forejure in French is taken for abjure, in Latin abjurare. 1 E. 3. 17. lib. Intr. Raſt. fo 246 b. pl. 6.

g Lib. Int. Raſt. 532. b. Sanct. 2. Hil 43 E. 3. Rot. 115. Buck. William Attewels caſe.

h For all Sanctuaries are taken away by 21 Jac. ca. 28. Note a Sanctuary in the ſtatute of 1 H. 7. cap. is called a hidel or hydle, becauſe it hideth and protecteth the party, &c. Vide Deut. cap. 19. 3. 9, 10. Numb. 35. 13. Joſhua 20. 8. See 2. part of the Inſtitutes, Gloc. cap.

Peyne fort & dure.

In caſe of Petit treaſon or felony,[i] when the offender ſtandeth mute, and refuſeth to be tried by the Common law of the land; See Paine fort and dure in the Second part of the Inſtitutes. W. 1. ca. 2. but this holdeth but in caſe of Petit treaſon and felony. In caſe of High treaſon, upon ſtanding mute, or a nihil dicit, the judgement aforeſaid ſhal be given againſt him, as if he had been convicted.

i Firſt part of the Inſtit. Sect. 545. Verb. Attaint. 2. part of the Inſtit. W. 1. c. 12. Dier 3 El. 205. a. 13 El. 300. b. See before in the chap. of Treaſon. See after in the next chapter of Forfeiture fo. when the party arraigned chalgeth peremptorily above the number of 36. viz. three whole Juries.

And in doing of execution, both in treaſon and felony, two things are to be obſerved. Firſt, that it be done by the right Officer, as the Sheriff, or Marſhall, for if any other execute the offender, it is felony. Secondly, execution muſt be made by him that is the right Officer according to the judgement: For example,[k] where the judgement is, that the offender ſhall be hanged, he cannot behead him, &c. as before is ſaid. Bracton lib. 3. fo. 104. b. Non alio modo puniatur quis, quam ſe habeat condemnatio. P. 20 R. 2. Coram Rege Rot. 58. Lincoln. Non licet felonem pro felonia decollari.

k 35 H. 6. 57, 58. Vide li. 9. fo. 124. the Lord Zanchers caſe.

Iudgment

Iudgement in case of Petit larceny.

Bracton.lib.3. fo.151.b. Britton.fo.24.2. Fleta l.1.ca.36. Bracton lib. 3. fo.104.b. maketh mention of punishment, verberibus & virgis. * 18 Ass.p.13. 8 E.Cor.130. 41 E.3.Cor.451.

The judgement herein was in ancient time referred to the discretion of the Judge, as in Bractons time, Per fustigationem, & sic castigatus dimittitur. In Brittons time, sometime by the Pillory, sometime by the losse of the eare: and Fleta saith, Est enim furtum de re magna & parva, pro minimo tamen latrocinio 12 denariorum & infra, nullus morti condemnetur; pro hujusmodi modicis delictis inventa fuerunt judicialia Pilloria, & deformitates corporum, ut scilicet auricularum.

* But in & since the reign of E.3. no person lost any member for Petit larceny, but were sometime punished by imprisonment, and sometime by other penance, as whipping, &c. If the Delinquent flyeth for Petit larceny, and so be found by the Jury, he forfeiteth his goods.

Iudgement in case of misprision of High Treason.

That the offender by the Common law shall for this concealment forfeit all his goods, and the profits of his lands during his life, and suffer imprisonment during his life. Vide Stanford Pl. Coron. fo.38. 1 et 2 Mar.cap.10.

Iudgement for striking in Westminster hall, &c. sitting the Courts.

Tr.4 E.4. Coram Rege Rot.3. 19 E.3. Judgement.174. 39 Ass.p.1. 41 Ass.25.

That the offender shall be imprisoned during his life, forfeit all his lands, tenements, goods and chattels, & quod manus sua dextra amputaretur (apud talem locum) and this Judgement is given by the Common law. Bracton lib.3. 104.b. Pœnarum quædam adimunt membrum, & corporis coercionem, sc. imprisonamentum, vel ad tempus, vel imperpetuum.

22 E.3.13.2. 41 E.3. Coron.280. 42 Ass.18. Stanf.Pl.Cor.38.c. 3 Eliz. Dier 188.

Iudgement for striking and drawing blood in the Kings Court, &c.

The offender shall have his right hand stricken off, be imprisoned during his life, and be fined and ransomed at the Kings will: and this Judgement is given by the statute of 33 H.8.cap.12. 33 H.8. Paine Br.16.

1 & 2 Ph.& Ma. ca.3. obtruncatio manus dextræ.

We cannot omit to touch by the way an Act made in 1 & 2 Ph. & Mar. intitled, an Act against seditious words and rumours, by a branch of which Act, he that should set forth any book, ryme, ballad, letter or writing containing any false matter, clause or sentence of slander or reproach, and dishonour of the King and Queens Majesty, or either of them, &c. should have his or their right hand stricken off; which Act being but a Probationer, at the Parliament in 4 & 5 Ph. & Mar. was continued untill the end of the next Parliament. And

1 El. c.6.

by the Act of 1 Eliz. (which was the next Parliament) the said Act of 1 & 2 Ph. & Mar. was enacted to extend to Queen Elizabeth, and to the heirs of her body Kings and Queens of this Realm, so as by the demise of Queen Eliz. that Act hath lost his force, as it was well worthy, being a dangerous Act, as some had felt in anno 23 Eliz.

Iudgement in a Premunire at the suit of the King.

See the 1. pt of the Instit. §.159.

If the Defendant be in prison, Quod prædictus R. sit extra protectionem domini Regis, & terras, & tenementa, bona & catalla domino Regi forisfaciat, & quod corpus ejus remaneat in prisona ad voluntatem Regis, as in the book of Entries, Rast. Judgment 465. And this Judgement is given by the statutes of 25 E.3.ca.22. 25 E.3. de Provisoribus. 27 E.3.ca.1. 16 R.2.ca.5. and if he be

44 E.3.36.

not in prison, Quod præd. R. sit extra protectionem domini regis, & terras & tenementa, bona & catalla domino regi forisfaciat, & quod capiatur.

Iudgement in case of Theftbote.

5 E.3.Cor.353. 29 E.3.9. 27 Ass.69. 42 Ass.pl 5. Stanf.fo.40.b.

That the offender be fined: and it is to be observed that whensoever the Delinquent, or Defendant is to be fined, the Judgement is quod capiatur, that is, to be imprisoned untill he doth pay his fine: but when the Defendant is to be amerced, and not fined, then the Defendant is in misericordia, whereof you may

may read at large, Lib.8.fo.38,39.&c. et 59,60. et 120. Lib.11,43,44.

Pillory.

Pillory is a French word, and it is derived of the French word Pilastre a Pillar, columna. Et est lignea columna, in qua collum inferium premitur, and thereupon in law it is called Collistrigium, quia in eo collum hominum constringitur: this punishment is very ancient, for the Saxons called it Healrranz, so called for straining the neck. Britton fo.24. saith, that those that have been adjudged to the Pillory, or Tumbrell, are so infamous, Come ilz ne sont receivables al serement faire in juries, enquests ou en testmoignants; and herewith agreeth Bracton. Vet. Mag. Cart. 2. parte fo.23,24.45.

Saxonicè *Healsfang*. Or *Halsfang*, *Hals* collũ, *fang* pressio. It is also called an amerciament for commutation of such a punishment.

51 H.3. Judicium Collistrigii. Et Pillorii, Vet.N.B.1. parte.116,117. Britton fo.24. Mirror cap.4.§.De paines en divers manners. Kelway Temps E.3.145.b. Fleta li.2.cap.8. By the statute of 51 H. 3. & 31 E.1. Vet.Mag.Cart.2.parte.fo.23,24.45.

Tumbrell.

Tumbrell is a word in use at this day for a Dungcart. Bracton calleth it Tymboralem.

Bracton lib.3. fo.104.b.129.b. 151.b.138.

Infligitur pœna corporalis, sc. pilloralis vel tumberalis cum infamia. Secundum regni statuta, It is called tumberellum, there being no proper latin word for a Dungcart.

Mirror ubi supra. Temps E.3.Kelway 139,140.b. 149.b.152. Fleta li.2.ca.11. §.Item si dñus Li.Intr.Rast. 494.a. in Q. o warr. 7 E.2.in eodem 160.b.

Furce Pillor et Tumbrell append al View de Franckpledge. And every one that hath a Leet or Market ought to have a Pillory and Tumbrell &c. to punish offenders, as Brewers, Bakers, Forestallers, &c.

Trebuchet.

Or castigatory, named in the statute of 51 H.3. signifieth a Cucking stool, and Trebuchet properly is a pitfall or downfall, and in law signifieth a stool, that falleth down into a pit of water, for the punishment of the party in it. And Cuck, or Guck in the Saxon tongue, signifieth to scould or brawl, (taken from the Cuckhaw, or Guckhaw, a bird, qui odiose jurgat et rixatur) and Inge in that language [water] because she was for her punishment sowsed in the water, and others fetch it from Cuckquean, i. pellex.

Stat.de 51 H.3. ubi supra. Vet.Mag. Cart. part 2. fol.44.45. Stat. de pane & cervisia.

Now for that the Judgement to the Pillory or Tumbrell (as it hath appeared before) doth make the Delinquent infamous, and that the rule of law is, Iudicium de majore pœna quam quod legibus statutum est non infamum facit, sed per breve de errore adnullare potest, and again, pœna gravior ultra legem posita æstimationẽ conservat, that the Justices of Assise, Oier and Terminer, Gaol-delivery, and Justices of Peace, would be well advised before they give judgment of any person to the Pillory or Tumbrell, unlesse they have good warrant for their judgment therein. Fine and imprisonment for offences finable by the Justices abovesaid, is a fair and sure way.

Judgements to be given by Justices of Assise, of Oier and Terminer, of Gaol-delivery, of Justices of Peace.

And it is to be observed that those kinds of punishments of Pillory, &c. have been given by Acts of Parliament in cases of enormious and exorbitant offences, as by the statutes of 51 H.3. 31 E.1. De pistoribus, &c. 31 E.1. De forestallariis. 31 H.7.ca.4. 33 H.8.ca.1. 1 & 2 Ph. & Mar. cap.10. 2 E.6.ca.15. 5 E.6. ca.6.& 14. 7 E.6.ca.7. 1 El. c.7. 5 El.ca.9.16. 18 El.cap. And therefore the safest way for them is to follow those Acts of Parliament in cases provided by the same: But of the Court of the Kings Bench, (the highest Court of ordinary Justice) in respect of the multitude of the judiciall presidents (which we have seen) we say with the Poet. Huic nec metas rerum, nec tempora pone, (for judiciall presidents of grave and reverend Judges, are good guides to direct men in the right way) we will enumerate some of them.

* Vet.Mag.Cart. pte 2.fo.24 25.

21 E.1. Coram Reg.Rot.2. Enstachius de Porles Castel for slandring of Justice Berisford, imprisonment in the Tower, ad voluntatem regis.

Exemplary punishments adjudged in the Kings Bench.

Mich. 33 E.1. Coram Rege Rot. 75. William Brewces case, for slandring, &c. of Roger

Roger Hegham Iuſtice. Tr. 3 E 2. Int. Mem. Scaccarii for ſlandering of Foxley, a Baron of the Exchequer. Mich. 18 E.3. coram rege. Rot.151. for ſlandering of the Iuſtices of the Kings Bench, by a Letter of Tho. Bulbroke a Clerk of the ſame Court. 30 Aſſ.p.5.19.19 Aſſ. 1. Paſch. 10 E.3. Rot. 87. Thom. Twyce Hazarder eōis ludens ad falſos talos adjudicatur quod per ſex dies in diverſis locis portetur ſuper colliſtrigium. Mich. 10 E. 3. Rot. 92. coram rege, Adam de Rivenſworth. Mich. 21 E.3. coram rege. Warw. Verſs. attornat' apparent' ſine Warranto. Hil. 25 E.3. coram rege, Rot. 13. verſus Robert Hadham Commiſſionarium pro venditione Bladi in garbis adjudicatur priſonæ, & quod ab omni officio Domini Regis amoveatur & finem faciat. Tr. 2 H.4. coram rege, Rot.10. Suſſex. Mich. 4 & 5 Eliz. coram rege, Hugh Bakers caſe, for a Libell againſt certain of the inhabitants of Cherſie, puniſhed by impriſonment, Pillory, and good behaviour, &c.

Ancient rules of law in corporall puniſhments. Bracton lib. 3. fo. 105.a.

See the fourth part of the Inſtitutes, Cap. Star-Chamber, for puniſhment by Pillory, &c. for enormious and exorbitant offences, which require more exemplary puniſhment then an ordinary courſe of the Laws of the Realm do inflict. Nobiles magis plectuntur pecunia, plebei vero in corpore; which is obſervable in all the ſaid ſtatutes. And Bracton ſaith, Quælibet pœna corporalis, quamvis minima, major eſt qualibet pœna pecuniaria. Carcer ad continendos, non ad puniendos haberi debet, &c. Pœnæ potius molliendæ, quam exaſperandæ ſunt. Reſpiciendum eſt judicanti, ne quid aut durius, aut remiſſius conſtituatur, quam cauſa depoſcit; nec enim aut ſeveritatis, aut clementiæ gloria affectanda eſt. Aliter puniuntur ex eiſdem factionibus ſervi, quam liberi: & aliter qui quidem aliquid in dominum, parentemve commiſerit, quàm in extraneum; in magiſtratum, quam in privatum.

Ibid.

Ibid.

Death of a man per infortunium.

Marlbr.cap.25.

Of this miſchance there is no expreſſe judgement to be given, but the offender is to ſue out his pardon of courſe, as it appeareth in the ſecond part of the Inſtitutes, Gloc.cap.9. And hereof Bracton ſaith, Caſu, cum per infortunium, ut ſi aliquis venando per telum in feram miſſum, hominem interfecerit, & ſimilia perpetraverit, &c. But albeit there be no expreſſe judgement given upon ſuch a verdict, yet the law giveth a judgement thereupon, viz. that he ſhall forfeit all his goods and chattels, debts and duties whatſoever, as in the ſecond part of the Inſtitutes, *ubi ſupra*, it appeareth.

Bracton ubi ſup.

Iudgement implyed, or in law. 24 H.8.cap.5.

Of death of a man, ſe defendendo.

Upon ſuch a verdict given the Court giveth no expreſſe judgement, for he is alſo to be pardoned of courſe: but the law hath given a judgement, that he ſhall forfeit all his goods and chattels, debts and duties, as in the ſecond part of the Inſtitutes, *ubi ſupra*, it appeareth. But the Jury cannot finde that the party killed him generally ſe defendendo: but they ought to finde the caſe ſpecially, ſo as the Court may judge whether in law it be ſe defendendo, or no. See Stanf. fol.15.

Iudgement implyed or in law. See ca.7. fo.95.b. 43 Aſſ.p.31. Rot. Parl.3 R.2. nu.18. John Imperials caſe.

Of the death of a man that offereth to rob, &c.

If it be found by verdict, that the party (indicted or appealed for the death of A) A attempted to have murdered or [a] robbed him in or nigh any common High way, Cart-way, Horſe-way, or foot-way, or in his [b] manſion or dwelling houſe; or for the killing of him which attempteth Burglary to break his dwelling houſe in the night; the judgement upon ſuch a verdict ſhall be, that he ſhall be acquited of the death of ſuch a perſon paying his fees, and he ſhall forfeit nothing. And ſo it is [c] declared and enacted by the ſtatute of 24 H. 8.

a 3 E.3. cor.305.
b 3 E.3.cor.330. 26 Aſſ. 23. Exod.22. Si effringens vir domum ſive ſuffodiens fuerit inventus, & accepto vulnere mortuus fuerit, percuſſor non erit reus ſanguinis.
c Nota, declared, &c. and ſo was the common law, as by the Books aforeſaid it appeareth.

And if all the circumſtances be proved to the Jury in evidence required by this Act in theſe caſes, the Jury may finde a generall verdict of not guilty. And where it is rehearſed in the ſaid Act of 24 H.8. that before that Act it was a queſtion and ambiguity whether evill diſpoſed perſons ſo attempting, ut ſupra, ſhould forfeit their goods and Chattels: the reaſon of that queſtion and ambiguity was in

nions

none of thoſe caſes mentioned in that Act, no Robbery, Murder, or Burglary was done, but an attempt only to do it. But it was no queſtion at the Common law, that if a Robbery, Murder, Burglary, or other felony was done, and purſuit made after the offender, who either by reſiſtance or flight could not be apprehended without killing of him by inevitable neceſſity, the party ſo purſuing and killing ſhould not forfeit his goods or chattels; for in thoſe caſes every man may arreſt the felon by a warrant in law. But there is a diverſity between a warrant in deed, and a warrant in law, in this, that if a man be indicted of Murder, Robbery, Burglary, or other felony, and the Sheriffe by vertue of a Capias offer to arreſt him, and he reſiſteth and flye, ut ſupra, the Sheriffe may kill him, if otherwiſe he cannot arreſt him although in truth the party be not guilty, nor any felony done. But in the caſe of the aboveſaid warrant in law, there muſt be a felony done, and this diverſity appeareth in our Books. * And ſo it is, if after arreſt for felony the party arreſted reſiſteth or flyeth, and in purſuit is ſlaine by inevitable neceſſity, they ſo killing him forfeit nothing.

An Approver that kils the party accuſed in battell, or a Champion that killeth the other Champion in a Writ of Right, or the plaintife or defendant in an appeale that killeth the other in duello, according to the Common law, or in combat awarded by the a Conſtable and Marſhall in the Court of Chivalry, the party killing ſhall forfeit nothing; for theſe combats or duels are ſuch trials as the law appoints in ſuch caſes. For ſaith Fleta, Duellum eſt ſingularis pugna inter duos ad probandum veritatem litis; & qui vicerit probaſſe intelligitur: & quamvis judicium Dei expectatur ibid. quicunque tamen monomachiam, *i.* ſingularem pugnam ſponte ſuſceperit, aut obtulerit, homicida eſt, & mortale contrahit peccatum. But before we leave theſe Champions, it is to be obſerved that whoſoever taketh upon him to be a Champion for another (the forme and b oath whereof you may reade in the Second part of the Inſtitutes, W. 1. cap. 40. & Glanvil lib. 2. cap. 3.) if he become recreant, that is, a crying Coward or Craven, he ſhall for his perjury c loſe liberam legem. d Craven is derived of the Greek word κραυγη, à vociferatione: others nearer home, of crying and craving of mercy and forgiveneſſe. And recreantia is derived of the French word recreance, of giving back or cowardize. And ſometime it is called creantia e per antiphraſin, becauſe he that uſeth it is not faithfull, but breaketh his oath. And ſo if the Appellant joyne battell, and cry Craven, he ſhall alſo loſe liberam legem for the cauſe aforeſaid, but if the Appellee cry Craven he ſhall be hanged: * but if they combat untill night come, and ſtarres appear, the defendant in the appeal goeth quit, and the plaintife in that caſe loſeth not liberam legem. f Amittere liberam legem is to become infamous and of no credit, never to be witneſſe, or Juror: for when he is of fame and credit, he is called Liber & legalis homo: and ſuch men ought to be of Juries and Witneſſes, becauſe they do enjoy liberam legem. g And a Champion ought to be liber homo, and ſo is the Entry, per corpus liberi hominis. Et quam infamiam victus incurrit, ſee Glanvile lib. 2. cap. 3. & lib. 14. cap 1. And he further ſaith, Talis debet Campio petentis eſſe, qui ſit, & eſſe poſſit inde teſtis idoneus. So as no man by the ancient Common law could be a Champion, but he that knew the right, and was a witneſſe thereof: And therewith agreeth the ſtatute of W. 1. cap. 40. wherein obſerve what the oath was by the Common law. Aliquando patria ſtat pro campione, & aliquando in bre de recto campio ſtat pro patria. Campio is derived à campo, becauſe it is publickly ſtroken in the field, and is called Camp-fight: and is taken in the Common law for one that ſtriketh a legal Camp-fight or Combat in another mans quarrel: in Latin he is called * Pugil, à pugna. But the defendant in an appeal that is to combat, is not called a Champion, becauſe he fighteth for himſelfe. And theſe combats in caſes whereof the conuſance belongs to the Common law, are to be directed by the Judges of the Common law ſecundum legem & conſuetudinem Angliæ, and not by the Conſtable and Marſhall by the Civill law, as all our ancient Authors and Bookes aboveſaid do agree, which alſo is apparant by the ſtatute of 13 R. 2. ca. 2.

22 Aſſ. p. 55.
22 E. 3. cor. 261.
3 E. 3. cor. 328.
3 E. 3. ibid. 288. 289. 290.
* See in the Chap. of Hue and Cry.
a Rot. Pat. 3 H. 4. part. 2. Duellum percuſſum.
13 H. 4. 4.
37 H. 6. 20, 21.
See before in the Chapter of Approver.
Fleta lib. 1. ca. 32.
b 4 E. 3. 41.
30 E. 3. 20.
29 E. 3. 12.
13 Eliz. Dier 301
Mirror cap. 3. § Combat, & § Juramentum duelli, & § Ordinatio pugnantiũ.
c Judgement in law againſt a Recreant and Craven Champion is, *perdere liberam legem.*
See a notable Record hereof R. pa. 55 H. 3. m. 3
Glanvil li. 2. c. 3, lib. 14. cap. 1.
d Mirror cap. 3. § Ordinatio pugnantiũ, L' horrible mote de Craven.
e 41 E. 3. cor. 98. *Creant* for *recreant.*
Bract lib. 3. f. 141
Brit. fo. 42. 81.
Fleta lib. 1. ca. 32.
19 H. 6. fo. 35.
21 H. 6. 34.
* Mir. c. 3. § ubi ſu.
f Glanvil lib. 2. cap. 19. Legem terræ amittentes perpetuã infamiæ notã inde merito incurrunt.
See the firſt part of the Inſt. Sect. 514. 27 Aſſ. 59. liberam legem, qui, &c.
g 1 H. 6. 6.
3 H. 6. 55.
See the oath in appeal, Bracton lib. 3. fo. 141. b. Britton fo. 42.
Fleta lib. 1. ca. 32.
Glanvil lib. 2. c. 3.

Lib. 9. cap. 1. Et lib. 14. ca. 1. 9 H. 4. 3. 17 aſſ. 3 17 E. 3. 2. 9 E. 4. 2. Fleta ubi ſup. Lib. Int. Co. fo. 182. 55 H. 3. ubi ſup.

Iudgement in an Indictment of Conſpiracie, &c. where the party indicted is legitimo modo acquietatus.

4 H. 5. Indict. 220. Tr. 18 E. 3. coram Rege Rot. 148. Wilt. judicium reddit. contr. Conſpiratores. Paſch. 32 E. 3. Rot. 58. Somerſ. 27 Aſſ. 59. 24 E. 3. 34. 43 E. 3. 33. b. Vid. Artic. ſuper cart. cap. 10.

Nota, the judgement in this caſe is, as in caſe of attaint againſt a Jury, (whereof we ſhall ſpeak hereafter), viz. Quòd committantur Gaolæ Domini Regis, & quod omnia terræ & tenementa præd. R. & C. capiantur in manum Domini Regis, & devaſtentur, & extirpentur, & uxores & liberi eorum amoveantur, & omnia bona & catalla eorundem R & C. forisfaciant Domino Regi, & amodo amittant liberam legem imperpetuum.

Nota in this judgement Five ſevere puniſhments. 1. That their bodies ſhall be impriſoned in the common Gaole. 2. Their wives and children amoved out of their houſes. 3. That all their houſes and lands ſhall be ſeiſed into the Kings hands, and the houſes waſted and the trees extirpated. 4. All their goods and chattels forfeited to the King. 5. That they for ever ſhall loſe the freedome and franchiſe of the law. That is, Firſt, they ſhall never be of any Jury or Recognitors of Aſſiſe. Secondly, nor ever be received for a witneſſe in any caſe. Thirdly, that they ſhall never come into any of the Kings Courts, but make Attornies, if they have any thing to do there. And this is called a * villanous judgement, becauſe of the villany and infamy which they deſerve againſt whom it is given: And all is inflicted by the Common law, for that the offenders by falſe conſpiracy under the pretext of law, by indictment of treaſon or felony and legall proceeding thereupon, ſought to do the greateſt injuſtice by falſe conſpiracy to ſhed his blood, who afterwards is thereof legitimo modo acquietatus.

* 24. E. 3. fo. 33. 27 Aſſ. 53.

But in a Writ of Conſpiracy at the ſuit of the party grieved, the Judgement is, damages to the party, fine to the King, and impriſonment. And the reaſon thereof is, Firſt, for that when they are indicted at the ſuit of the King, the judgement is ſo ſevere, for that they falſely conſpired in the Kings name, and at the Kings ſuit by indictment, &c. to do ſo horrible injuſtice: therefore at the Kings ſuit they ſhall be heavily puniſhed. Secondly, for that as it is ſaid in 15 E. 2. De exilio Hugonis, &c. the law which was inſtituted for the maintenance of peace and of good men, and the puniſhment of the evill, is turned to the diſheritance of the great men, and deſtruction of the people. Thirdly, for that the judgement at the Kings ſuit is by the Common law, and the Action of the party is given by ſtatute, which giveth no ſuch puniſhment: but the party in his action, in reſpect of the danger of his life, is to recover anſwerable damages. Of Conſpiracy ſee the Regiſter fol. 134. a & b. & 188. F. N. B. 114, 115, &c. Stanf. pl. cor. fol. 172, 173, 174, 175, &c. and in the new Book of Entries, fol. 109. a preſident of a conſpiracy upon an indictment of felony.

4 H. 5. judg. 220 24 E. 3. 34. 27. aſſ. 59.

43 E. 3. 33. b. Tr. 32 E. 1. Rot. 15 Eborum.

Parl. 17 E. 3. nu. 50.

It is enacted, that ſuch as be attainted of Confederacy or Conſpiracy, ſhall have no office of the grant of the King, Queen, or other Noble, neither ſhall be Sheriffe or Eſcheator.

Iudgement in an Attaint.

Lib. Intr. Raſtal. fo. 92. a. 9 E. 4. 51. 4 H. 5 ubi ſup. 15 Aſſ. 2. Kelway 130. b. Glanvil. lib. 2. cap. 19. Bracton lib. 4. fo. 129. Brit. fo. 237, 238. Mirror ca. 3. § de attaint. Flet. lib. 5. ca. 21.

1. That the plaintife ſhall be reſtored, &c. and the defendant party to the Record ſhall be fined in reſpect the falſe verdict was given for him (cui bono) by the Common law.

The judgement againſt the Petit Jury is, as it is in caſe of Conſpiracy at the ſuit of the King, as is aboveſaid, and in no other, but in thoſe two caſes, that villainous judgement is given. See 8 E. 2. Aſſ. 396. and 42 E. 3. 26. b. Judgements given in Attaint, & nota bene. 16 E. 3. tit. Judgement. 109. 21 H. 7. 83. Kelway. a good preſident of a judgement given in an attaint. Forteſcue cap. 26. Concerning Attaints, ſee the ſecond part of the Inſtitutes, Marlbr. cap. 14. W. 1. cap. 37, &c.

Apud Northalverton in Com. Eborum coram Hen. de Guildeford & aliis Juſt. aſſignatis An. 35 E. 1. attincta. See the firſt part of the Inſtitutes. Sect. 514. Verb. [en attaint.] Vide Mich. 3 H. 4. Rot. 149. judgement en attaint. Banc.

But now by the ſtatute of 23 H. 8. cap. 3. the ſeverity of the puniſhment is moderated

derated, if the Writ of Attaint be grounded upon that ſtatute: but the party grieved may at his election either bring his Writ of Attaint at the Common law, or upon that ſtatute: but all attaints either at the Common law or upon the ſtatute are to be taken before the King in his Bench, or before the Iuſtices of the Common Pleas, and in no other Courts.

This Act of 23 H. 8. provideth for divers miſchiefs which were at the Common law, and giveth to thoſe of the Petty Jury divers pleas, which they could not have at the Common law, and hath been well expounded. 7 E. 6. Dier 81. b. Sir John Ailifs caſe. 3 & 4 Ph. & Mar. 129. b. Heydons caſe. 3 Eliz: 201. Clovils caſe. 3 Eliz. 202. Auſtens caſe. 7 Eliz. 23. b. Stephens caſe. See the Record thereof upon the ſtatute of 23 H. 8. for it is an excellent preſident.

And generally of Attaints, See Lib. fo. 111. 112. Lib. 3. fo. 4. Lib. 6. fo. 4. 14, 25, 26. 44. 80. Lib. 8. fo. 60. Lib. 9. fo. 12, Lib. 10. fo. 119. Lib. 11. fo. 6, 43. 62. See alſo the new Book of Entries, 63, 66. 68, 70, 73, 76, 77. 81, 83, 85, 86, &c.

Iudicium de corrupto Iudice.

We could not paſſe over a ſtrange judgement of Suſpendatur, &c. as in caſe of felony (which we have touched before in the Chapter of Bribery) given againſt Sir William Thorpe, lately before Chief Iuſtice of England, which we finde of Record in theſe words. Proceſſus factus An. 24 E. 3. contra Willielmum Thorp chivaler nuper capitalem Juſticiarium coram Ricō Comite Arundel. T. de Bello-campo Comite Warw. Willielmo de Clinton Comite de Hunt. Joh. de Gray de Rothersfield Seneſchallo hoſpitii Regis, & Barthel. de Burgherſ. Camerar̄ Regis: Pro eo quod idem Willielmus Thorp nuper capitalis Juſticiarius Domini Regis ad placita coram ipſo Rege tenenda, dum ſtetit in officio, cepit munera contra juramentum ſuum, viz. de Ricard. Saltley 10 li. de Hildebrando Boreſward 20 li. de Guilberto Hollyland 40 li. de Tho. Darby Sancti Botulphi, & de Roberto Dalderby 10 li. qui pro diverſis feloniis, falſitatibus, & tranſgreſſionibus coram ipſo Willielmo in ceſſione ſua apud Lincolne Anno 23. fuerunt indictati, & per ipſum Willielmum bre de exigendo verſ. eos reſpect' fuit: quæ omnia & ſingula dedicere non potuit: Ideo adjudicatum fuit, prout ſequitur, *viz.* Conſideratum eſt per dictos Juſticiarios aſſignatos ad judicandum [a] ſecundum voluntatem Domini Regis, & ſecundum regale poſſe ſuum, quòd quia prædictus Willielmus de Thorpe qui Sacramentum Domini Regis quod erga populum habuit cuſtodiendum fregit [b] malicioſe, falſe, & rebelliter in quantū in ipſo fuit, & ex cauſis ſupradictis per ipſum Willielmum, ut prædictum eſt, expreſſe cognitis, ſuſpendatur. Et quod omnia [c] terræ & tenementa, bona & catalla ſua Domino Regi remaneant forifacta. Et poſtea Dominus Rex mandavit bre ſuum ſub privato ſigillo, all in French, and there entred de verbo in verbum. Ideo conſideratum eſt quod executio Judicii prædicti de ſuſpenſione ejuſdem Willielmi omnino ceſſet & ei pardonetur. Et quod idem Willielmus remittatur priſonæ Turris prædict. ad gratiam Domini Regis expectandam, &c. Et non eſt intentio Domini Regis quod hujuſmodi judicium in conſimili caſu verſus quemcunque alium ex quacunq; cauſa ſe teneat vel extendat, ſed ſolummodo verſus eos qui prædictum [d] Sacramentum fecerunt, & fecerunt, & fregerunt & habent leges regales Angliæ ad cuſtodiend'.

[e] We have alſo found, that at a Parliament holden at Weſtminſter in Octabis Purificationis beatæ Mariæ, Anno 25 E. 3. holden before Lionel Duke of Clarence by force of the Kings Commiſſion, &c. Commandement was given, that the Record of the ſaid Judgement againſt the ſaid Sir William Thorp ſhould be brought into the Parliament, and there to be openly read before the Nobles of the Parliament to hear every of their advices, which was done accordingly, and there the Nobles affirmed the judgement,

And theſe words in the ſaid judgement, Ad judicandum ſecundum voluntatem Domini Regis, & ſecundum regale poſſe ſuum, and that his lands ſhould be forfeit to the King, & prædict. Sacramentum, were grounded upon the oath of the Kings Iuſtices in Anno 18 E. 3. the concluſion of which Oath is, [upon pain to be at the Kings will body, lands, and goods, thereof to be done as pleaſeth him.]

Rot. pat. Anno 24 E. 3. part 3. m. 2. in dorſ. & Rot. pat. Anno 25 E. 3. part 1. m. 17.

In toto 80. li.

a The effect of the words of the oath hereafter mentioned.

b Nota, here is neither *felonice*, nor *proditorie* in this indictment, but *rebelliter*.

c According to the ſaid oath, for otherwiſe the King had no colour to have the forfeiture of all his lands for felony, but every Lord of whom they were reſpectively holden, &c.

d Nota, prædictum ſacramentum.

e Rot. Parl. in Oct. Pur. An. 25 E. 3. nu. 10.

We desirous to satisfie our self herein, searched for the Record of this oath, and albeit there is a Parliament Roll of this Parliament, and other Acts, then passed by Authority of Parliament, he entred into the said Roll, yet this is not, for that it had not the warrant of an Act of Parliament. It ought to have been printed amongst the Statutes of the Realm, and the title of them is, Here followeth the oath of the Justices made in the same eighteenth year, but saith not at the Parliament, &c. but after it became to be printed: and that which is printed in anno 20 E.3.ca.1. is but a recitall made by the King alone, and no Act of Parliament: for it appeareth by that which precedeth, and by the oath it self, that it was the act only and commandement of the King, for it beginneth: First, we have commanded all our Iustices, &c. which former part was but a recitall of some precedent Act: and then followeth, We have ordained and caused our said Iustices to be sworn, &c. so as the oath was devised by the King, and the Iustices sworn before this Parliament. Lastly, it is there said and concludeth: And for this cause we have encreased the fees of our said Iustices, &c. which the King of himself did before this Act also.

And we have an ancient Manuscript of the Acts of Parliament in Anno 18 E.3. and the oath is not within it.

Fleta li.1.ca.17. §. Cum igitur non sit, &c.

And it appeareth by Fleta, that the punishment of a corrupt Judge, that receiveth gift or reward was, Si inde convictus fuerit, quòd imperpetuum à concilio regis excludatur; terrasque, res, redditus, & proventus bonorum suorum amittat per unum annum: qui, si proventus non habuerit, puniatur per discretionem regni & consiliariorum regis. And that which Fleta calleth Sacramentum Justic, in Vet. Magna Carta, is named Iuramentum consiliariorum regis: for the Iudges of England are of the Kings Counsell (as elsewhere hath appeared) for, in, and concerning the laws of the Realm, in which oath also the said fatall clause is omitted.

Vet.Mag.Cart. 1.parte fo.165. Vide Bract.li.3. fo.109. Sacrament' Justic' itiner' and that then was the effect, de sacrament' Justic' residentium.

See the Mirror cap.4. §. de faux Iudges, & ca.5.§.1. of the law in the time of King Alfred, how many Iustices were in one year hanged, as homicides, for their false judgements: but that law hath been long since defeat and antiquated, and yet may serve for a memoriall of the time past.

Vid. Flet l.2.c.7. §. Item atrox est injuria, &c.

The offence of Bribery was punished by fine, and ransome, and losse of the reign of E.1. as in the Chapter of Extortion and Bribery before appears: only Sir Thomas Weyland Chief Iustice of the Common Pleas, took Sanctuary, and before a Coroner confessed himself guilty of murder, and according to the course of the Common law abjured the Realm, so as indeed he was attainted of felony, (which case hath been vehemently urged) but it was not for bribery, but for murder, as any other man might have been.

8 R.2.ca.3. Vide Vet.Mag. Cart.fo.165.2. ubi supra. 9 R.2.cap.1. *a* In respect of the recitall. *b* Ro.Par.11 H.4. nu. 28. not heretofore printed. Vid.1 H.4.nu.99. * Nota. *c* This is agreeable to the law of God, Deu.16.19. Non accipies personam, nec munera, quia munera excæcant oculos sapientum, & mutant verba justorum. Exodus 23.8.

But to winde up the third of this discourse with three Acts of Parliament. First, with the statute of 8 R.2. wherein it is recited, that whereas in the time of King E.3. it was ordained, that Iustices as long as they should be in office, should not take gift or reward, and so forth, as in Veteri Magna Carta (without the said fatall clause) That Act provideth, that the oath without that fatall clause should extend as well to the Barons of the Exchequer, as to the Iustices, and expressed the penalty of all to be (according to the Common law) viz. losse of office, fine and ransome. But at the next Parliament, viz. 9 R.2. the said Act of 8 R.2. for that it was *a* very hard, and needed declaration, was made of no force till it be declared in Parliament. *b* Afterwards at the Parliament holden 11 H.4. it was debated what punishment great Officers there named Counsellors of the King, and Iudges, &c. should have, which should take any gift, reward, or brocage for doing of their offices or services: in the end it was declared and enacted by Authority of Parliament, in these words following. Item que nul Chancelor, Treasorer, Garden del Privy Seal, Counsellier du Roy Servientes a Counsell du roy, ne nul autre Officer, * Jugge ne ministre du roy pernont fees ou gages de roy pur lour dites offices ou service, preigne en nul manner, en temps avenir a scun manner de *c* done ou brocage de nulluy pur lour dits offices & services affaire, sur peine de 1 responder a roy de la treble de ceo,

que

que iſſi preignont, 2 & de ſatisfier la party, 3 & punis al volunt le roy, & 4 ſoit diſcharges de ſon office, ſervice, & counſell pur tous jours, & que cheſcun que verra purſuer en la dit mattier eit la ſute ſibien pur le roy come pur luy meſme, & eit la tierce part del ſumme de que la partie ſoit duement convict. *Reſponſ.* Le roy le voet.

Nota Four puniſhments. 1. By the Court of juſtice where the matter ſhall depend (as hath been often obſerved) by fine and imprisonment. *a* In the oath of the Juſtices in Wales, that fearful clauſe is omitted, neither is it in the oath of the Barons of the Exchequer of England. *b* Veritas nihil veretur niſi abſcõdi.

[a] This Act being by Authority of Parliament, hath limited the puniſhment (amongſt others) of corrupt Judges, of whom now we entreat, ſo as the former example of Sir William Thorp is not now to be followed, which we affirm not in favour of ſordid bribery, (which we hate, as in the proper Chapter thereof before appeareth) but in advancement of juſtice and right, which is the end of our labour in this and other of our works; [b] and therefore have cauſed that good Act that hath lived ſo long in obſcurity, for the better notice and obſervation thereof, to be put to the preſſe, which never was yet printed; and the cauſe thereof was, for that in the Margent of the Parliament Roll of this Act, it is written, Reſpectuatur per dominum Principem & Concilium: A ſtrange preſumption without warrant of the King his Father, and of the Parliament, to cauſe ſuch a reſpectuatur to be made to an Act of Parliament.

The like he did to another Act in the ſame Parliament, nu. 63. concerning Attorneys, the like whereof was never done in any former or latter Parliaments. * This was that Prince Henry, who keeping ill company, and led by ill Counſell, about this time aſſaulted (ſome ſay) and ſtroke Gaſcoign Chief Juſtice ſitting in the Kings Bench, for that the Prince endeavouring with ſtrong hand to reſcue a priſoner, one of his unthrifty minions indicted and arraigned at the Kings Bench Bar for felony, was prevented of his purpoſe by the perſwaſion and commandement of the Chief Juſtice, for which the Chief Juſtice committed the Prince to the Kings Bench, whereof ſome of his followers inſtantly complained to the King his Father: who informing himſelf of the true ſtate of the caſe, gave God infinite thanks, that he had given him ſuch a Judge, as feared not to miniſter juſtice, and ſuch a ſon, as could ſuffer ſemblably and obey juſtice. And this is that Prince, who abandoning his former company and counſell, and following the advice of grave, wiſe, and expert men, whom he made choice of to be of his Councel, became a victorious and vertuous King, and proſperous in all that he took in hand, at home and abroad.

* See Sir Tho. Eliot in his Govenour, &c. Holl. Chron. 543. a.

For the duty of Judges, it is truly ſaid (as before hath been ſaid) that Judex debet habere duos ſales, viz. ſalem ſcientiæ, ne ſit inſipidus, & ſalem conſcientiæ, ne ſit diabolus. And what perſons ſhould be Judges, ſee Bracton lib. 1. cap. 2. & lib. 3. fo. 106. & Fleta lib. 1. cap. 17. § caveat, and the Mirror ca. 2. §. 2. de Iudges. & Rot. Parl. 17 E. 3. nu. 3. 10.

To theſe we will add, that upon the concluſion of a marriage then to be had between Philip the ſon of the Emperour, and Prince of Spain, it was nobly and wiſely provided by the Queen, the Lords Spirituall and Temporall, and the Commons by authority of Parliament (amongſt many other excellent proviſions worthy of obſervation) that the ſaid Prince ſhould not promote, admit, or receive to any office, adminiſtration or benefice in the Realm of England, & the Dominions thereunto belonging, any ſtranger, or perſons not born under the dominion and ſubjection of the moſt noble Queen of England: and that the ſaid moſt noble Prince ſhould doe nothing whereby any thing might be innovated in the ſtate or right, either publique or private, or in the laws & cuſtomes of England, or the Dominions thereunto belonging, but ſhall contrariwiſe confirm and keep, to all eſtates and orders, their rights and priviledges.

Anno 1 Mar. ſtat. 2. ca. 2 in print. See the Articles of Concord, 21 Maii Anno Dom. 1420. & Anno 8 H. 5. between King H. 5. and Charles the French King, whereby the Crown of France after the death of the ſaid Charles, was eſtabliſhed to H. 5. and his heirs. Artic. 7, 8. &c.

And it is there further provided for the future, &c. that if the ſaid Prince ſhould have iſſue male or female, the order of ſucceſſion is there declared, but with this Proviſo. Provided nevertheleſſe, and expreſſly reſerved in all and ſingular the above declared caſes of ſucceſſion, that whatſoever he or ſhe be, that ſhall ſucceed in them, they ſhall leave to every of the ſaid Realms, Lands and Dominions whole and entire their priviledges, rights, and cuſtomes, and the ſame Realms and Dominions ſhall adminiſter, and cauſe to be adminiſtred by

by the naturall born of the said Realms, Dominions, and Lands.

By this, Philip (after King of Spain) could not prefer any stranger born to any office of Iudicature, &c. within the Realm of England, or Dominions of the same, nor all the time he was within this Realm, ever attempted the same.

Vide Camden. El. 322. Artic. inter reginam Eliz. & Franciscum Ducé Alonson anno 23 El. Populo super importune ut nuberet suadente in comitiis.

And in the Articles, De matrimonio prælocuto inter Reginam Elizabetham & ducem de Alonson, amongst others it was expressly provided, Quod dux nullum extraneum ad aliquod officium in Anglia promovebit, & nihil in jure mutabit. &c.

a Also King Iames wisely provided by Authority of Parliament, by the advice of the Lords Spirituall and Temporall, and Commons in that Parliament assembled, that whereas in regard of some difference and unequality of the laws, trials, and proceedings * in case of life, between the Iustice of the Realm of England, and that of the Realm of Scotland, it appeareth to be most convenient for the contentment and satisfaction of all his Majesties Subjects to proceed (with all possible severity) against such offenders in their own Country according to the laws of the same, whereunto they are born and inheritable, and by and before the naturall born Subjects of the same Realm, if they be there apprehended. And by the nert clause it is provided, that felonies committed by Englishmen in Scotland, shall be enquired of, heard, and determined before Iustices of Assise, or Commissioners of Oier and Terminer, and Gaol-delivery, being naturall born Subjects within the Realm of England, and none other. And the like in another clause with an addition of Iustices of Peace to be naturall born Subjects within England; and God blessed and prospered this Act with happy and desired successe.

a 44 Ja. Regis ca. 1. about the midst.

* That case being then in question.

Math. Par. pag. 363. 380. 383, &c. Hol. Chron. pag. 231. & 1071. a. b.

But contrariwise, Petrus de Rupibus, or of the Rocks, being a Gascoign born, preferred to be Bishop of Winchester by King John, and being a principall Counseller about King H. 2. both in his young years, did after in his riper age prefer to offices about the King, such Gascoigns as were of his blood or alliance, (whereof one of his kindred, some say his son, Peter de Otival Treasurer of England,) to the great grief and discontentment of the Nobility of England to have a Gascoign born in place above them. And what heavy event ensued thereupon, let Historians inform you, for it is grievous to me to remember it.

Vide 50 E. 3. nu. 167. for the keeping of the castle of Nottingham. Vide 18 E. 1. Rot. Parl. nu. Solomon de Rolfes case.

If you desire to see somewhat concerning Ecclesiasticall offices, promotions, and benefices, first what petitions have been made in Parliament against Aliens or Strangers; look in the Parliament Rolls of 50 E. 3. nu. 96, 97. 110. 13 E. 3. nu. 23. 17 E. 3. nu. 59, 60. 18 E. 3. nu. 38. 2 R. 2. nu. 6 H. 4. nu. 48. 4 H. 6. nu. 29. &c. And what laws have been made that Aliens or Strangers should not be advanced to the same; Vide 35 E. 1. Statut. de Carlisle. 3 R. 2. ca. 3. 7 R. 2. ca. 12. Rot. Parl. 13 R. 2. not in print. 1 H. 5. ca. 7. 4 & 5 Ph. & Mar. ca. 6.

CAP.

CAP. CII.

Forfeiture, Confiſcation, &c.

NOta confiſcare & forisfacere are Synonyma, and bona confiſcata are bona forisfacta: Fiſcus properly ſignifieth a Panier or Hamper of Oſiers, wherein the Romanes kept their treaſure, and by the figure of Metonymia continens pro contento, it is taken for the treaſure it ſelf, unde confiſcare, and bona confiſcata, and thereupon it is ſaid, Quod non capit Chriſtus, capit Fiſcus.

For the derivation of *forisfacere*, See the Firſt pt of the Inſtitutes, Sect. 74. fo. 59. a. 3 E. 3. forfeit. 24.

Of forfeiture of lands and tenements, and other hereditaments for high treaſon, petit treaſon, felony, miſpriſion of treaſon, præmunire, and in ſome caſes of miſpriſion,* and what hereditaments which be not holden ſhall be forfeited for high treaſon, and ſhall not eſcheat for Petit treaſon or Felony, we have ſpoken before in their ſeverall chapters, &c. now let us ſpeak of forfeiture of goods and chattels in theſe and ſome other caſes.

* See before cap. High treaſon, Verbo [De tres & tenements, &c.] fol. 18. & 19. Et cap. de Petit treaſon. Verb. [Et de tiel manner de treaſon,] &c. fo. 21.

[a] Of theſe the forfeiture of ſome of them muſt appear, or be found of Record, and therefore theſe cann ot be claimed by preſcription; of other ſome the forfeiture need not appear, or be found of Record, and therefore theſe may be gained by preſcription.

a See the 1. pt of the Inſtitutes, of both theſe branches.

[b] Of the former ſort be bona & catalla proditorum, felonum, utlagat', in exigend' poſitorum, fugitivorum, deodand', annus, dies, & vaſtum, &c. and all other forfeitures which muſt appear or be found of Record.

b See the 1. part of the Inſtitutes, ubi ſupra, both the former and latter ſort.

Of the latter ſort be Treaſure trove, bona & catalla waviat', extrahur', wreccum maris, &c'

[c] If a Traitor or Felon either reſcue himſelf, or will not ſubmit him to be arreſted, but reſiſteth, and in reſiſtance is ſlain; upon preſentment hereof he forfeiteth all his goods and chattels.

c 3 E. 3. Cor. 290. 312.

[d] If a Felon in purſuit wave his own goods, they are forfeited, yet are they not bona waviata.

d 29 E. 3. 29. 45 E. 3. Cor. 100.

If in appeal of robbery the Plaintif omit any of the goods ſtoln, they are forfeit to the King for the favour, which the law preſumeth, the Plaintif beareth to the Felon: and for that he cannot have reſtitution for more then is in his appeal.

In appeal of robbery of goods, if the Jury find that the Defendant found them in the high way, in this caſe the Plaintif for his falſe appeal, in ſeeking the blood of the innocent, ſhall forfeit his goods to the King.

3 E. 3. Cor. 367, 368.

If one arraigned for treaſon or petit treaſon, challengeth peremptorily above thirty five, he forfeiteth his goods, and judgment of Paine fort & dure ſhall be given againſt him, as one that refuſeth the triall of law, by challenging three full Juries, and like unto one that ſtands mute and will not put himſelf upon the triall of the law.

3 H. 7. 12.

By the ſtatute of 22 H. 8. it was provided that no perſon arraigned for any petit treaſon, murder or felony, ſhall be admitted to any peremptory challenge above the number of twenty: but at this day in caſe of high treaſon, notwithſtanding the ſtatute of 33 H. 8. cap. 22, 23. and petit treaſon notwithſtanding the Act of 22 H. 8. he may challenge thirty five according to the Common law, for it is enacted by the ſtatute of 1 & 2 Ph. & Mar. cap. 10. that all trials hereafter to be awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the Common law, ſo as to Petit treaſon the Act of 22 H. 8. is abrogated, but in caſes of murder and felony he cannot challenge peremptorily above the number of twenty, and if he challenge above twenty,

22 H. 8. c. 14. 32 H. 8. ca. 3. See before *Peine fort & dure* in the next preceding Chapter. See before in the Chapter of Petit treaſon, fo. 26.

ty, and under thirty ſhr. he forfeiteth not his goods and chattels, for no law giveth forfeiture for challenging above twenty; but the Court ought to over-rule the challenge: neither is he convicted by the challenging above twenty, as he was by the Common law by challenge of three Juries, for the Act of 22 H.8. extendeth not to any conviction, but to the challenge only.

8 E.2. Forfeit. 17. 2 E. contumac. 17. 7 H.6.9. 26 H.6. Attachment 4. 28 H 6.9. 34 H.6.29.49. 32 H.6. ibidem 9 H.7.6. Broke Tit. forfeit. 4. 3 El. Dier 199. pag. 54. 1. part of the Inſtitutes. §. 745.

If the party Defendant be attached or diſtreyned by proces out of any Court of Record, County, by force of a Juſticies, &c. hundred Court, or other Court Baron, and make default, the goods or iſſues are forfeited, and upon the attachment the Sherif or other Officer may take the goods with them: and this is the reaſon that upon the attachment the Sherif or other Officer ought to return the certainty of the goods and the value, and it is not ſufficient to return that he hath attached or diſtrained the Defendant by goods to ſuch a value, and ſo upon the diſtreſſe the iſſues muſt be returned in certain, becauſe they are upon default to be forfeited.

What a perſon convict of felony before attainder ſhall forfeit: ſee the Firſt part of the Inſtitutes, Sect. 745. Verb. Attaint. fo. 391.

See Supra in the Chapter of Deodands, and in the Chapter of Wreck. Vid. Stanford Pl. Cor. fo. 183, 184, &c.

CAP. CIII.

Of the ſeiſure of goods, &c. for offences, &c. before conviction.

1. REgularly the goods, &c. of any Delinquent cannot be taken and ſeiſed to the Kings uſe, before the ſame be forfeited.

Vide 25 E.3. ca. 14.

The ſame cannot be inventoried, and the Town charged therewith, before the owner be indicted of Record.

2.

3. It is to be obſerved, that there is two manner of ſeiſures, one verball without taking, removing, or carrying away, only to make an Inventory, and to charge the Town: And the other an actuall ſeiſure, and taking away the ſame.

26 Aſſ. p. 32. 43 E.3. fo. 24. 44 Aſſ. p. 14. 7 H.4. fo. ultimo. Lib. 8. fo. 171.

As to the firſt, the ſame is manifeſt by Bracton, and all our ancient Authors: and let Bracton ſpeak for them all.

See the 1. part of the Inſtitutes. Sect 745. f. 391. a. Bract. l. 3. f. 123. Brit. fo. 4. b. Fleta l. 1. c. 25, 26.

Priſones impriſonati, antequam convicti fuerint, de terris ſuis diſſeiſiri non debent, [a] nec de rebus ſuis quibuſcunque ſpoliari; ſed dum fuerint in priſona debent de proprio in omnibus ſuſtentari, donec per judicium deliberati fuerint vel condemnati, &c. And fo. 136. b. he ſaith thus, Qui pro [b] crimine vel felonia magna, ſicut pro [c] morte hominis, captus fuerit & impriſonatus, vel ſub cuſtodoia detentus, non debet ſpoliari bonis ſuis, nec de terris ſuis diſſeiſiri, ſed debet inde ſuſtentari donec de crimine ſibi impoſito ſe defenderit, vel convictus fuerit, [d] quia ante convictionem nihil forisfacit; & ſi quis contra hoc fecerit, fiat Vicecom' tale bre. [e] Rex vic' ſalutem. Scias quòd [f] proviſum eſt in curia noſtra coram nobis, quod nullus homo captus pro morte hominis, vel pro alia felonia pro qua debeat impriſonari, diſſeiſietur de terris, tenementis vel catallis ſuis, quouſque convictus fuerit de felonia de qua [g] rectatus eſt, ſed quam cito captus fuerit per viſum cuſtodum placitorum coronæ noſtræ, & per viſum tuum & legalium hominum apprecientur catalla ipſius capti, & imbrevientur, & ſalvo cuſtodiantur per [h] balivos ipſius qui capitur, & qui bonam inveniant ſecurita-

a Nota the generality of theſe words. Hil. 29 E.1. Coram Rege in Aſſ. Campions caſe. b In this word treaſon is comprehended. c Nota Mort del home eſt felonia magna. d Note this reaſon extends as well to treaſon, as to felony. e This writ is in the Regiſt. f That is, by Magna Cart. cap. 29. and that Act extends to treaſon as well as to felony. 5 E.3. cap. 9. Fleta l. 2. c. 26. accord. g Id eſt, indictatus, for before Indictment no verball ſeiſure can be made, or Inventory taken. Stat. de 4 E.1. de offic. Coronatoris, & aliquis culpabilis inveniatur, &c. Britton f. 4. b. accord. h So it was in Bractons time, but afterwards the Townſhip was charged, and anſwerable for the ſame. Britton fo. 18. Mirror c. 2. §. 13. Fleta l. 1. c. 25, 26. 43 E.3. 18. a.

cem

tem de respondendo coram Iusticiariis nostris cum ab eis exigantur: salvo tamen eidem capto & familiæ suæ necessariæ, quandiu fuerit in prisona, rationabili estoverio suo, &c. *i.* rationabili victu & vestitu. 3 E.3. Coron. 366. 13 H.4. 13.

a Note the generality of these words.

b Mic. 18 E.1. Corã Rege Ro. 34. Norff. Nisi quis appellatus indictatus vel cum manu opere captus fuerit, non competit regi secta contra ipsum.

By the statute of 1 R. 3. cap. 3. it is enacted and declared, That neither Sherif, Escheator, Bailise of Franchise, [a] nor other person take or seise the goods of any person arrested, or imprisoned, before he be convicted or attaint of the felony, [b] according to the law of England, or before the goods be otherwise lawfully forfeited, upon pain to forfeit double the value of the goods so taken to the party grieved.

Begging of lands and goods before conviction, &c. unlawfull.

So as (super tota materia) these two conclusions are manifestly proved. First, that before Indictment, the goods or other things of any offender cannot be searched, inventoried, or in any sort seised; nor after Indictment seised, and removed, or taken away before conviction or Attainder. Secondly, that the begging of the goods or state of any Delinquent accused or indicted of any treason, felony, or other offence before he be convicted and attainted, is utterly unlawfull, because before conviction and attainder, as hath been said, nothing is forfeited to the King, nor grantable by him. And besides it either maketh the prosecution against the Delinquent more precipitate, violent, and undue, then the quiet and equall proceeding of law and justice would permit, or else by some underhand composition and agreement stop or hinder the due course of justice for exemplary punishment of the offender. And lastly, when the Delinquent is begged, it discourageth both Judge, Juror, and witnesse to doe their duty.

It was an Article of Inquiry, De hiis qui aliquid agunt per quod veritas & justitia suffocantur. Cap. Itineris.

See Lib. 7. f. 36, & 37. the case of penall statutes, & Nota bene: See also the statute of 21 Iac. ca. 3. à fortiori in case of life. Placitum coronæ ought not to become in effect placitum privatum. And if it fall out that the party accused be legitimo modo acquietatus, let such as begge him and prosecute against him be terrified by the villanous judgment against Conspiratours, which you may read before cap. Judgements and Execution.

CAP. CIV.

Of Falsifying of Attainders.

Syers case, Anno 32 Eliz.

AT Twelfe Sessions of the Peace holden at Norwich for the County of Norfolk, Anno 32 Eliz. one Syer was indicted of Burglary, supposed to be committed 1 Augusti Anno 31 Eliz. whereunto Syer pleaded not guilty. And upon the evidence it appeared that the burglary was committed 1 Septemb. Anno 31 Eliz. so as at the time alledged in the Indictment there was no burglary done: and it was conceived that the very true day in the Indictment was necessary to be set down in the Indictment, for that the judgement doth relate to the day in the Indictment, and so avoid Feoffements, Leases, &c. for that (as it was also conceived) the feoffee, lessee, &c. when the attainder is upon a verdict, should not falsifie in the time of the felony: and thereupon the Jury found Syer not guilty. And at the same Sessions Syer was again indicted for the same burglary done 1 Septembris anno 31 Eliz. when in truth it was done. And he that gave the charge at that Sessions doubted, whether upon this matter Syer might plead Auter foitz acquite for the same burglary, (for seeing the offender is allowed no counsell, the Court ought to do him justice and assigne him counsell in favorem vitæ, though he demand it not, to plead any matter in law appearing to the Court for his discharge;) and thereupon he stayed the proceeding against him.

At the Assises in Lent, 32 Eliz. in Com. Norff.

And the Assises being at hand he acquainted the Justices of Assize, Wray Chief Justice, and Justice Peryam with this case, and with the doubts conceived thereupon; who answered him, that the like case had then been lately propounded by Justice Peryam to all the Justices of England; and by them three points were resolved.

Nota, The resolution of all the Judges.

1. That the Crown was not bound to set down the very day when the treason, felony, &c. was done, but the day set down in the Indictment being before or after the offence done, the Jury ought to finde him guilty, if the truth of the case be so; and if it be alledged before the offence done, to finde the day when it was done in rei veritate, for they are sworn ad veritatem dicendam, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment. 2. That if the Triers finde the offender guilty generally, yet the feoffee or lessee, &c. if the offence be alledged in the indictment before it was done to their prejudice, may falsifie in the time, but not for the offence. For seeing the Crown is not bound to set down the very just day when the treason or felony, &c. is done, and that the Triers have chief regard and respect of the offence it selfe, God forbid, but that the Subject might falsifie as concerning the time of the offence. 3. If the offender be found not guilty, he in that case might plead upon a new indictment, Auter foitz acquite: and so Syer in the case aforesaid did, and was thereupon discharged according to the said resolutions. Nota three notable points resolved, that never were resolved in any Book that we have read, and remember.

49 E. 3. 11. 7 E. 4. 1, 2.

If a man infeoffeth another of his land, and after is indicted of a felony supposed to be committed before the feoffment, and thereupon he is outlawed; the party himself is bound hereby, and cannot traverse the felony, but the feoffee, &c. may; because he is an estranger thereunto: for a false indictment without any tryall by verdict shall not binde the feoffee, &c. but that he may falsifie, either by traverse of the felony it selfe, or of the time of the feoffement.

And

And so it is if a man maketh a feoffement of his land, and after taketh Sanctuary, and confesse the felony before the Coroner by him to be done before the feoffement, and abjureth the Realm; the feoffee shall falsifie the attainder by traverſing of the felony. And so it is if a man be indicted of felony, and is attainted by his own confession, the feoffee shall falsifie the attainder by denying the felony. But otherwise it is if he be attainted upon a verdict given by twelve men, for then the feoffee shall not falsifie by traverſing of the offence, but of the time only.

11 H.4.94.
2 H.5. Ellop. 91.
7 E.4.1.2.
Vid. Rot. Parl. 23 H.6.nu.32.

Where the case in effect is, that 19 Januarii Anno 1 Mariæ, a Commission of Oier and Terminer in London was directed to Sir Thomas White the Lord Maior of London, and to divers others, reciting, that where Sir Robert Dudley Knight, 9 Januarii Anno 1 Mariæ was indicted of High Treason before Thomas Duke of Norff. and 14 others Commissioners of Oier and Terminer in the County of Norff. (where in truth that Commission was directed to so many, but the indictment was taken but before 8 of them only) granting to them or any 4 of them, authority to receive the indictment taken before 15 Commissioners, and to proceed thereupon as speciall Justices of Oier and Terminer, &c. By pretext whereof they proceeded: and upon the confession of the said Sir Robert Dudley, gave judgement against him in case of High Treason. [a] In this case it was adjudged, that Sir Robert Dudley, then Earl of Leic. might falsifie the said attainder by plea, because it was void, and Coram non judice; for that the said latter Commissioners [b] had no power to proceed upon an Indictment taken before 8, but before 15, and so the judgement was void, and coram non Judice: for wheresoever the judgement is void or coram non judice, the party is not driven to his Writ of Error, but may falsifie the attainder by plea, shewing the speciall matter which proveth it void, or coram non judice. In which case the party forfeiteth neither lands nor goods. By which case it appeareth how necessary it is for Judges, especially in cases of Treason and Felony, to look into the whole Record, and the proceedings thereupon, before they give judgement, lest they give an unlawfull and unjust judgement, by means whereof the party may lose his life, &c.

Pl.com. f. 390. Le Countee de Leic. case.

a Tri. 3 El.
b V. for this point 22 Ass.p.64. 39 E.3.33,34. 41 Ass.p.ult. 27 Ass.p.55. 39 Ass.p.6. 7 H.4.3.9 H.4.1. 10 H.6.13. 36 H.6.32. 31 H.6.10. 4 H.6.24. 22 E.4.31. Colyns case. 2 H.3.10. 4 H.7.18. 2 H.7.fo. Vide Rot. Parl. 18 E.1.Rot.11. Mountgom. Bogo de Knovil, &c.

[c] A and B were indicted, A as principall of felony, and B as accessory for receiving him. A fled and was attainted of the felony by outlawry. B the accessory (being seised of lands in fee holden of C) was arraigned upon the indictment and found guilty by verdict, and had judgement, and was hanged: C the Lord entreth as Lord by Escheat: A the principall reverseth the Outlawry, and to the felony pleaded not guilty, and by verdict was found not guilty, and thereupon was by judgement acquited. The Heir of B. brought an Assise of Mordancestor against C the Lord by Escheat, who pleaded the outlawry of the principall, and the attainder of the accessory, his seasin in fee, and the execution, and his entry as Lord by Escheat. [d] The plaintife shewed the reversall of the outlawry by the principall, and his acquitall by verdict and judgement, whereupon the Lord demurred in judgement. And it was adjudged that the plaintife in the Writ of Mordancestor should recover against the Lord by Escheat. Upon which judgement we observe these five conclusions. 1. [e] That the attainder of the accessory hath a kinde of dependancy upon the attainder of the principall. For it is a Parime in Law, That the accessory ought not to be put to answer before the principall be attainted; and by the reversall and acquitall of the principall, the dependant judgement against the accessory cannot stand. 2. [f] That this attainder of the accessory may be falsified and avoided by the Heir by plea, and is not driven to his Writ of Error; for that the attainder of the accessory is by matter in law avoided by Record of as high nature as the attainder of the principall was. For in this case it is impossible that there should be an accessory where there was no principall, of the same felony. 3. That the Escheat of the land lawfully once vested shall by this matter ex post facto, be devested. 4. Though there were no immediate discent to the Heir, yet upon the judgement of the acquitall of the principall the Writ of Mordancestor was maintainable. Lastly, that albeit the attainder of the accessory is avoided by judgement of law, yet the

c See this case temps E 1. tit. Mordanc. 46. but not fully there reported. Vid. lib. 9. fo. 119. Lord Zanchers case.
d Where the ancestor of the accessory was lawfully and in due form attainted of felony and yet the heire shall inherit by matter ex *post facto*.
e Vi. li. 5. fo. 119. b. Lo. Zanchers case Debili fundamento fallit opus. 2 R.3.fo.12.
f 26 E.3.57. 7 H.6.44. 43 E.3.3. 4 E.3.36. 11 H.4.4.6. 9 H.6.38.b. 8 H.4.4. 10 H.6.6. 6 E.4.8. 8 H.7.10. 13 E.4.4.

18 E.4.9.b.

Lord by Eſcheat remain tenant of the land, untill it be evicted from him by action or entry. And ſo it is if the principall be attainted of felony, and after the acceſſory is alſo attainted, if the principall reverſeth his attainder by Writ of Error, the attainder of the acceſſory dependant thereupon is reverſed.

Dier 20 Eliz.135 lib.6.fo.13,14. in Arundels caſe.

A man commits treaſon or felony, and is thereof attainted in due form of law, and after this treaſon or felony is pardoned by a generall pardon; hereby the foundation it ſelf, viz. the treaſon or felony being by authority of Parliament diſcharged and pardoned, the attainder (being builded thereupon) cannot ſtand, but may be falſified and avoided by plea, for he hath no other remedy by Writ of Error or otherwiſe.

In the County of Warwick there were two brethren, the one having iſſue a daughter, and being ſeiſed of lands in fee deviſed the government of his daughter and his lands, untill ſhe came to her age of ſixteen years, to his brother, and died. The Uncle brought up his Niece very well both at her Book and Needle, &c. and ſhe was about eight or nine years of age: her Uncle for ſome offence correcting her, ſhe was heard to ſay, Oh good Uncle kill me not. After which time the childe after much inquiry, could not be heard of: Whereupon the Uncle being ſuſpected of the murder of her, the rather for that he was her nert Heir, was upon examination Anno 8 Jac. Regis committed to the Gaol for ſuſpicion of murder, and was admoniſhed by the Juſtices of Aſſiſe to find out the Childe, and thereupon bailed him untill the nert Aſſiſes. Againſt which time, for that he could not finde her, and fearing what would fall out againſt him, took another child as like unto her both in perſon and years as he could find, and apparelled her like unto the true child, and brought her to the nert Aſſiſes, but upon view and examination, ſhe was found not to be the true child; and upon theſe preſumptions he was indicted, found guilty, had judgement, and was hanged. But the truth of the caſe was, that the child being beaten over night, the nert morning when ſhe ſhould go to ſchoole, ran away into the nert County: and being well educated was received and entertained of a ſtranger: and when ſhe was ſixteen years old, at what time ſhe ſhould come to her land, ſhe came to demand it, and was directly proved to be the true child. Which caſe we have reported for a double caveat: firſt to Judges, that they in caſe of life judge not too haſtily upon bare preſumption: and ſecondly, to the innocent and true man, that he never ſeek to excuſe himſelf by falſe or undue means, leſt thereby he offending God (the author of truth) overthrow himſelf, as the Uncle did.

Falſifying concerning goods.

Bract.lib.3.f.128 129.a.Brit.ca.12. fol.20. 3 E.3.forfeit.25. 22 Aſſ.96. 13 H.4.13. *a* 4 H.7.18. *b* 3 E.3.cor.296. & 344. *c* 47 E.3.26. 13 E.4.fo.8.a. Travers de chattell al common ley. *d* 27 Aſſ.p.50. 41 Aſſ.p.13. 44 Aſſ.p.16. Lib.5.fo.111. Foxleyes caſe. *e* Bra.li.3.f.129.a 43 E.3.18. 7 E.4.17.a. *p* Cheke.45 Aſſ. p.9.Stanf. pl. cor.284.d.

If A be indicted before the Coroner for the death of another, and that A fled for the ſame; hereby are all the goods and chattels of A forfeited which he had at the time of the verdict given; and this cannot be falſified by traverſe. For if the party be arraigned upon the ſame indictment before Juſtices of Gaole delivery, and is by verdict acquitted of the felony, and that he did not flee for the ſame; yet he ſhal forfeit his goods and chattels, but yet, [a] ſuch a fugam fecit may be falſified by matter in law; for if the indictment be void or inſufficient, there is no forfeiture. [b] But if a man be indicted before Juſtices of Oier and Termine, and is acquited by verdict, and they finde further that he fled for the ſame, his goods are forfeited which he had at the time of the verdict given; [c] and it being alſo found in particular what goods he then had, that may be traverſed by any that had property in thoſe goods.

There is alſo a fugam fecit in law. [d] As if a man be indicted or appealed of felony and proces continued againſt him, upon his default of appearance, and an Exigent awarded againſt him, whereupon he appeareth, albeit he be after acquited of the felony, yet all his goods and chattels are forfeited by the awarding of the Exigent upon this fugam fecit in law. [e] But this may be falſified by matter in law: for if the Indictment or Writ of Appeal be inſufficient, or error be in the Proces or Exigent, the ſame may be avoided by exception, and no forfeiture of goods. And there is no Book to warrant the opinion of Juſtice Stanford

ford in this caſe: for in 43 E. 3. the originall Writ was good, Quod adnoto, non ut arguam, ſed ne ipſe arguar. And alſo by matter in deed or Record he may excuſe his abſence, as if he were in priſon or beyond the ſea, at the time of the Exigent awarded, or if the King before the Exigent doth pardon him. 30 H. 6 tit. forfeit. 31. 19 E. 3. ibid. 19. 223. 45 E. 3. Aſſ. 9.

A is indicted of Petit Larceny, and upon his triall is found not guilty, and that he did flye for the ſame, he ſhall forfeit his goods. And ſo it is if an Exigent be upon ſuch an Indictment awarded againſt him: but he may falſifie the ſame to free him of the forfeiture of his goods by ſuch means as is aforeſaid. See the firſt part of the Inſtitutes. Sect. 745. fol. 391. a. 8 E. 2. cor. 406.

Hæ leges vitam veſtram (generoſa Juventus)
Inſtituunt, quæ ſunt fugienda, ſequendaq; monſtrant.

CAP. CV.

Of Pardons.

WE have ſpoken of the royall and eſtabliſhing vertue of Juſtice: royall and eſtabliſhing I ſay, becauſe Juſtitia firmatur ſolium, by Juſtice the Royall Throne is eſtabliſhed. We are now to ſpeak of his Mercy: for the ſame Holy Spirit ſaith, Miſericordia & Veritas cuſtodiunt Regem, & roboratur Clementia Thronus ejus. Mercy and truth preſerve the King, and by clemency is his Throne ſtrengthened. And hereupon is the law of England grounded. Non ſolum ſapiens debet eſſe Rex, ſed & miſericors, ut cum ſapientia miſericorditer ſit juſtus, &c. Quibus tamen & qualiter eſt miſerendum, doceant eum merita vel immerita perſonarum, &c. Of this Royall vertue we ſhall ſpeak the more willingly, for that (as it hath appeared before in the Chapter of Sanctuary) all Sanctuaries and places of Refuge for ſafegard of life are taken away. And where Bracton in the ſame place ſpeaking of the Kings mercy ſaith, Nihil tam proprium eſt imperii quam legibus vivere, it is to be obſerved, that the lawes of this Realm have in ſome ſort limited and bounded the Kings mercy, as ſhall appear hereafter. And for as much as his mercy is conveyed unto his Subjects by his pardons, we ſhall now ſpeak thereof, being led thereunto by the Book in 9 E. 4. where it is holden A cheſcun Roy appent per reaſon de ſon office a faire juſtice & grace; juſtice in execution des leyes, &c. & grace de granter pardons, &c. Prov. 16. 12. Prov. 20. 28. Bract. lib. 3. fo. 9 E. 4. 2. 2.

[a] A Pardon is a work of mercy, whereby the King either before attainder, ſentence, or conviction, or after, forgiveth any crime, offence, puniſhment, execution, right, title, debt or duty, Temporall or Eccleſiaſticall: [b] All that is forfeited to the King by any attainder, &c. he may reſtore by his Charter: but if by the attainder the blood be corrupted, that muſt be reſtored by authority of Parliament.

We call it in Latin Perdonatio, and derive it à per & dono: per is a Prepoſition, and in the Saxon tongue is for, or vor: as to forgive is throughly to remit, and *forethink is to repent, and forbear is to bear with patience, as it is ſaid, Leve eſt ferre, perferre grave.

[c] All Pardons of Treaſon or Felony are to be made by the King, and in his name only, and are either generall or ſpeciall. All pardons either generall or ſpeciall, are either by Act of Parliament (whereof the Court in ſome caſes ſhall take notice) or by the Charter of the King, (which muſt alwayes be pleaded.) And theſe againe are either abſolute, or under condition, exception, or qualification: for

a Seneca lib. de Clementia, ca. 24. Remiſſius imperanti melius paretur.

b See the firſt part of the Inſt. Sect. 1. fo. 8. & Sect. 646, 647. See after cap. Reſtitution.

*Rot. Par. 17 R. 2 nu. 11, &c.

c 27 H. 8. cap. 4. Hil. 29 E. 1. coram Rege Heref. Jo. fil. Philippi Perpoint. 1 H. 4. fo 37. 17 H. 6. protect. 57.

for ſome of thoſe pardons laſt mentioned the party may have a writ of allowance, or take an averment in certain caſes, in others the party may be aided by averment only, where no writ of allowance doth lie.

11 H.4.fo.41. 28 H.8.Dier 28. 3 Mar.ibid.200. 26 H 8.fo.7. There is a very generall and abſolute pardon. Ro.Par.15 H.6. nu.31.33 H.6. nu.29.&c.

And firſt of generall pardons. Generall pardons are by Act of Parliament, if any of theſe pardons be generall and abſolute, the Court muſt take notice of them, though the party plead it not, but would waive the ſame. But in theſe dayes the generall pardons have ſo many qualifications and exceptions of offences and things, and of perſons alſo, that the Court cannot take notice of them, neither can the party take benefit or advantage thereof, unleſſe he plead it: And for that it may concern the ſafety and quiet of many a ſubject, we have expreſſed the forme of the pleading of a generall pardon, and have ſet it down here in latin: but if the offence be objected in the Star-chamber, or any other Engliſh Court, then it muſt be pleaded in Engliſh.

* This is put but for an example, but care muſt be taken, that what generall pardon ſoever be pleaded the firſt clauſe of the pardon of diſcharge, &c. be truly alledged.

For the expoſition of generall words, See L.5. fo.47. Littletons caſe. Ibid.fo.46. Franklyns caſe. Ibid.fo.48. Drywoods caſe. Ibidem 49.b. Witrals caſe. Li.6.fo.79,80. Sir.Edw.Fittons caſe. Li.6.f.13.b. Li.Keylw.8 H.8. 187. Ibid.10 H.8. fo.198.a.ter.

Et præd' A. per B. Attornatum ſuum venit, &c. (or in propria perſona) Et dicit quod dominus Iacobus rex nunc ipſum A. occaſione præmiſſa impetere ſeu occaſionare non debet: quia dicit, quòd per quendam Actum in Parliamento dicti domini regis nunc tent' apud Weſtm' in com' Midd' nono die Februarii anno regni ſui ſeptimo, inter alia, inactitat' & ſtabilitum exiſtit authoritate ejuſdem Parliamenti, * quòd omnes & ſinguli ſubditi dicti domini regis tam ſpirituales, quam temporales hujus regni Angliæ, Walliæ, Inſularum Jerſey, & Garnſey, & villæ Barwic, hæredes, ſucceſſores, executores, et adminiſtratores ſui, & eorũ quilibet, ac omnia & ſingula corpora aliquo modo corporata, civitat', burgi, comitat', Riding, Hundred, Lath, Rape, Wapentag', vill', villat', Hamlet' & Tithing, & eorum quilibet, ac ſucceſſor, & ſucceſſores eorum, & cujuſlibet eorum authoritate ejuſdem Parliamenti acquietarentur, perdonarentur, relaxarentur, & exonerarentur verſus dictum dominum regem hæredes et ſucceſſores ſuos & quemlibet eorum de omnibus proditionibus, feloniis, offenſis, contempt', tranſgreſſ', intractionibus, injuriis, deceptionibus, malegeſturis, forisfacturis, pemilitatibus, & ſummis pecuniæ, pœnis mortis, pœnis corporalibus, & pecuniarijs, & generaliter de omnibus aliis rebus, cauſis, querelis, ſectis, judiciis & executionibus in prædicto Actu non exceptis, neque forpris', quæ per ipſum dominum regem aliquo modo, ſeu per aliquem modum perdonari potuerunt ante & uſque nonum diem Novembris tunc ultim' præterit' ante editionem Actus prædicti, cuilibet, aut alicui ſuorum ſubditorum, corporum corporat', civitat', burgorum, comitat', Riding, Hundred, Lath, Raparum, Wapentag', villæ, villat', & Tithing, vel aliquorum aliorum prout in Actu prædicto plenius continetur. Et idem A. dicit quòd * offenſa prædicta verſus ipſum in forma prædicta objecta non eſt in Actu prædicto excepta, neque forpriſata. Et quòd ipſe eſt & tempore editionis Actus prædicti fuit ſubditus & ligeus dicti domini regis nunc natus ſub obedientia ſua, videlicet apud Weſtm' prædict', quodque ipſe non eſt aliqua perſona in Actu prædict' except', neque forpriſat'. Et hoc paratus eſt verificare, unde non intendit quòd dictus dominus rex nunc ipſum A. occaſione præmiſſa impetere ſeu occaſionare velit, unde petit judicium. Et quòd ipſe de præmiſſis prædict' exoneraretur, & quòd generalis pardonatio prædicta ei allocatur, &c. See before cap. of Falſifying of Attainders.

These averments (as you perceive) may be take without any writ of allowance. 8 E.4.3.4 H.7.8. Li.8.fo.68. Trollops caſe.

Vid.16.fo.13, 14. in Arundels caſe. A caſe of Burton.

By the generall pardon of 28 El. all felonies are pardoned, Burglary excepted. Hil.29 El. it was reſolved by all the Juſtices, that a man being attainted of Burglary was excepted, for the Burglary remains, and is made more apparant by the attainder, and the offence of Burglary is the foundation.

Hil.29 El. the reſolution of al the Juſtices.

The moſt beneficiall generall pardons for the ſubject were thoſe of the fift, and thirteenth years of the reign of Queen Elizabeth, as by compariſon of thoſe with others, will to the judicious Reader eaſily appear. The beſt generall pardon in all King Iames time, was that of the 21 year of his reign, as by compariſon of that with any of his former, will evidently appear, and were too long here to be rehearſed.

And now of particular pardons. No particular pardon, be it at the Coronation, or any other, of any offence or offences whatſoever, that is abſolute without any

Hil.26.E.3.Coĩ Rege Rot.21. Wiltſ.

any condition, &c. need any writ of allowance, but when the pardon is conditionall by force of the Act of 10 E.3.cap.2. there a writ of allowance out of the Chancery testifying that the condition is performed, viz. surety found according to that Act may be had, or the party may plead the finding of surety, &c. and vouch the record.

3 H.7.7.a. this ſtature expounded, and this Act extend to felony, and not to treaſon.

The moſt large and beneficiall pardons by Letters Patents, that we have read, and doe remember, were that to William Wickham Biſhop of Winchester (for good men will never refuſe God and the Kings pardon, becauſe every man doth often offend both of them) and that other to Thomas Woolley Cardinall, which are learnedly and largely penned.

Rot. Pat. 21 Julii Anno 1 R.2.

Rot. Pat. 12 Feb. 21 H.8. great offences need great pardons, little offences are ſoon forgiven.

But let us turn our eye to ancient Charters of pardon, & conſider well of them.

Edwardus Dei gratia Rex Angliæ, Dominus Hiberniæ, & Dux Aquit', Omnibus balivis & fidelibus ſuis, ad quos præſentes lîræ pervenerint, Salutem. Sciatis quòd pro bono ſervitio quod Iohannes Chaumprona de Thornton in Pickerings, in partibus Scotiæ nobis impendit, perdonavimus ei ſectam pacis noſtræ, quæ ad nos pertinet * pro morte Iſabellæ, quondam uxoris ſuæ, unde indictatus eſt, & firmam pacem noſtram ei inde concedimus. Ita tamen quod ſtet recto, ſi quis verſus eum inde loqui voluerit. In cujus rei teſtimonium has literas noſtras fieri fecimus patentes. Teſte me ipſo apud Roukesburge, nono die Febr. anno regni noſtri triceſimo.

Hil. 29 E.1. Coram Rege Hereford. Johannes fil. Ph. Perpoint, &c.

* It appeareth by the Record that he killed her per infortunium.

Edwardus Dei gratia Rex Angliæ, Dominus Hiberniæ, & Dux Aquitan' Omnibus balivis & fidelibus ſuis ad quos præſentes literæ pervenerint, Salutem. Sciatis quod pro bono ſervitio quod Galf. filius Warnum in partibus Scotiæ impendit, perdonavimus eidem Galfro ſectam pacis noſtræ quæ ad nos pertinet, de homicidiis, roberiis, latrociniis, fractionibus domorum, feloniis & aliis tranſgreſſionibus contra pacẽ nr̃am in regno nr̃o factis, unde indictatus eſt, & ſimiliter tranſgreſſionem quam fecit ab Eccleſia de Watford, in qua aliquamdiu pro timore inimicorum ſuorum ſe tenuit fugiendo, & ſe ſecundum legem & conſuetudinem regni noſtri Iuſticiar' non permittendo, & etiam utlagariam, ſi qua in ipſum ea occaſione fuerit promulgata, & firmam pacem noſtram ei inde concedimus. Ita tamen quod ſtet recto in curia noſtra, ſi quis verſus eum loqui voluerit de homicidiis, roberiis, latrociniis, fractionibus, feloniis & tranſgreſſionibus prædictis. In cujus rei teſtimonium has literas noſtras fieri fecimus patentes. Teſte me ipſo apud Linũſcu viceſimo ſecundo die Ianuarii anno regni noſtri triceſimo, per breve de privato ſigillo.

Delib. Gaolæ de Windeſſore, coram Hugone de Braund, & Johanne Neprunt die Jovis proxim' poſt clauſ. Paſc. Anno 25 E.1.

It appeareth by this record, that the ſaid Ieffry was indicted for the death of a man, and of divers Burglaries and Felonies, and being thereupon arraigned prayed his Clergy, ſed ſalvo ſibi privilegio clericali poſuit ſe ſuper patriam, and was found not guilty, &c. in the proceeding whereof there was manifeſt error, and obtained the ſaid pardon. Herein divers things are obſervable: Firſt, that the pardon is de * homicidiis, and not de murdris, neither have we ſeen any pardon of murder by any King of England by expreſſe name. Secondly, by theſe ancient words the King doth pardon ſectam pacis noſtræ, quæ ad nos pertinet de homicidiis, &c. & firmam pacem noſtram ei inde concedimus. This ſecta pacis is by Indictment, which is the Kings ſuit, and, as it were, his declaration. Thirdly, that the King of ancient time did not pardon homicidium, &c. but ſectam pacis noſtræ quæ ad nos pertinet de homicidiis, &c. yet when he pardoned, and releaſed the ſuit or mean, viz. ſectam pacis, &c. the offender was diſcharged of the homicide it ſelf, in diebus illis, but at this day the offence it ſelf is pardoned, which is the ſureſt way.

* For this word Homicide, ſee in the Chapter of Murder. See Hil. 31 E.3. Coram Rege Rot. 7. Northumb.

9 E.4.28.

8 H.4.fo.22. Li.6.fo.13.b.

The King brought an action of debt upon an obligation, the Defendant pleaded non eſt factum, and at a Niſi prius it was found the deed of the Defendant; and before the day in bank, the King pardoned the Defendant all debts, querels, &c. and after the King had judgement, and ſued out execution, and the Defendant came and pleaded the pardon, and it was adjudged that in the Kings caſe, he might plead the ſame, though he had no day in Court, becauſe he could not have an Audita querela, or a Scire fac' againſt the King, and therefore

34 H.6.3.1.
35 H.6.1.2.
11.H.7.10.
Li.6.f.79.l.8.68.
Lib.Keylw.
8 H.8.fo.187.
2 R.2 4.b.ſimile.

fore if he could not plead it, he should be without remedy, but against a common person he could not plead it, because he ought to have an Audita querela, or a Scire fac'. And in this case it is observable, that albeit by the judgement a new title to the said debt is accrewed to the King of Record after the pardon, the obligation at the time of the pardon being but a matter in fact, yet for that the obligation was the * foundation of the debt, and the matter whereupon judgement was given, and by the pardon the debt due by the obligation was extinct, the judgment thereupon cannot bind, but is to be avoided by pleading the pardon.

* Pl. Com. f. 401. Coles case. 37 H. 6. fo. 21. Quatermains case. Li. 5. fo. 49. Vaughans case. Li. 6. fo. 13. *Cases de pardon.* 20 El. Dier 135.

What things the King may pardon, and in what manner, and what he cannot pardon, falleth now to be treated of.

Exod. 21. 12, 13, 14. Deut. 19. 13. *Non misereberis ejus, &c.*

[a] In case of death of man, robberies, and felonies against the peace, divers Acts of Parliament have restrained the power of granting Charters of pardons. First, that no such Charters shall be granted but in case where the King may doe it by his oath. [b] Secondly, that no man shall obtain Charters out of Parliament, and accordingly in a Parliament Roll it is said; [For the peace of the Land it would much help, if good Justices were appointed in every County, if such be let to mainprise doe put in good sureties, as Esquires or Gent. and that no pardon were granted but by Parliament.] Thirdly, for that the King hath granted pardons of felonies upon false suggestions, [c] it is provided, that every Charter of felony which shall be granted at the suggestion of any, the name of him that maketh the suggestion shall be comprised in the Charter, and if the suggestion be found untrue, the Charter shall be disallowed. And the like provision is made by the statute of 5 H. 4. cap. 2. for the pardon of an Approver.

a 2 E. 3. c. 2. 14 E. 3. ca. 14. 10 E. 3. ca. 2. b 2 E. 3. c. 2. 4 E. 3. ca. 13. Rot. Par. 13 E. 3. nu. 10. c 27 E. 3. c. 2. Trin. 30 E. 1. Rot. 2. Coram Rege London, Anno 29 E. 1. A pardon of death, ad instantiam Johan. Butecourt. Mich. 33 E. 1. Coram Rege Ro. 65. a pardon ad requisitionem H. de Bohun Counr. Heref. & Essex.

[d] Fourthly, it is provided that no Charter of pardon for murder, treason, or rape, shall be allowed, &c. if they be not specified in the same Charter.

d 13 R. 2. sta. 2. c. 1. 16 R. 2. ca. 6. 9 E. 4. fo. 26. b.

Before this statute of 13 R. 2. by the pardon [e] of all felonies, treason was pardoned, and so was murder, &c. [f] At this day by the pardon of all felonies, the death of man is not pardoned. These be excellent laws for direction, and for the peace of the Realm. [g] But it hath been conceived, (which we will not question) that the King may dispense with these laws by a non obstante, be it generall or speciall, (albeit we find not any such clauses of non obstante, to dispense with any of these statutes, but of late times) These statutes are excellent instructions for a religious and prudent King to follow, for in these cases, Ut summæ potestatis regis est posse quantum velit, sic magnitudinis est velle quantum possit. Hereof you may read more in Justice Stanford, lib. 2. cap. 35. in divers places of that Chapter, of his grave advice in that behalf. Most certain it is, that the Word of God hath set down this undisputable generall rule, [h] Quia non profertur cito contra malos sententia, filii hominum sine timore ullo perpetrant mala. And thereupon the rule of law is grounded. [i] Spes impunitatis continuum affectum tribuit delinquendi Et veniæ facilitas incentivum est delinquendi. This is to be added, that the intention of the said Act of 13 R. 2. was not that the King should grant a pardon of murder by expresse name in the Charter, but because the whole Parliament conceived, that he would never pardon murder by speciall name for the causes aforesaid, therefore was that provision made, which was (as in other cases I have observed) grounded upon the law of God, Quicunque effuderit humanum sanguinem, fundetur sanguis illius; ad imaginem quippe Dei creatus est homo. Nec aliter expiari potest, nisi per ejus sanguinem, qui alterius sanguinem effuderit. And the words of every pardon is after the recitall of the offence, Nos pietate moti, &c. See before in the Chapter of Murder, and in the Second part of the Institutes, Stat. de Glouc. ca. 9. and the Register fo. 309. pardon of the King, De morte per infortunium, se defendendo, vel per lunaticum, vel per furiosum.

e 1 E. 3. f. 24. f 8 H. 6. 20. 4 E. 4. fo. 10. g Li. 6. fo. 15. 9 E. 4. 26. b. per Billing Chief Justice.

h Eccles. 8. 11.

i Regulæ. Maledictus est qui peccat sub spe.

Genes. 9. 6. Num 35. 33.

By the ancient and constant rule of law, Non poterit Rex gratiam facere cum injuria & damno aliorum: quod autem alienum est, dare non potest per suam gratiam.

Bract. l. 3. f. 132.

In

In an appeal of death, robbery, rape, &c. the King cannot pardon the Defendant, for the Appeal is the ſuit of the party, to have revenge by death: and whether the Defendant be attainted by Judgment, &c. or by Outlawry, the pardon of the King ſhall not diſcharge the Defendant. * In an appeal, the Defendant wages battail, the Plaintif counterpleads, for that the Defendant brake priſon, if the King pardon the breaking of priſon, the counterplea fails: Note the breaking priſon is a collaterall act: and yet in divers caſes at the only ſuit of the party, when the Defendant either by the Common law, or by any ſtatute (beſides the reſtitution, or dammage of the Plaintif) is thereby alſo to have an exemplary puniſhment, the King may pardon the ſame. For example, In an attaint by A. againſt the party, and the petit Jury; againſt the party to have reſtitution, this the King cannot pardon: againſt the petit Jury, by the Common law that they ſhould loſe liberam legem, their wives and children caſt out of their houſes, their houſes walked, their trees proſtrated, their Meadows ploughed up, their goods and chattels ſeiſed, and their bodies taken, this the King may pardon, becauſe it is a puniſhment exemplary to deter others, and tendeth not to the reſtitution or ſatisfaction of the Plaintif.

11 R.2.Chꝛ 17. 2 R.3.fo.8. See 4 Mariæ Dier 133. * 2 E.3.Cor.134. 13 E.4.5.a.

Now to take an example upon a ſtatute. De pueris maſculis ſive fœmellis (quorum maritagium ad aliquem pertineat) raptis & abductis, ſi ille qui rapuit non habens jus in maritagio, licet poſtmodum reſtituat puerum non maritatum, vel de maritagio ſatisfecerit, puniatur tamen pro tranſgreſſione per priſonam duorum annorum. In this caſe the party being ſatisfied, the King may pardon the impriſonment by two years, for that was added as a puniſhment exemplary, puniatur, &c. And this doth notably appear by a Charter of pardon which King E.2. made after this ſtatute. Rex de gratia ſua ſpeciali perdonavit Godithæ, quæ fuit uxor Roberti de Waldiſch, id quod ad ipſum pertinet, de tranſgreſſione quam ipſa Goditha fecit Agathæ, quæ fuit uxor Johannis de Waldiſch de Ellam, rapiendo & abducendo Johannem fil' & hæredem Johannis de Waldiſch infra ætatem exiſtentem, cujus maritag' ad ipſam Agatham pertin', unde ipſa Goditha coram domino E. quondam rege Angliæ patre ipſius regis convicta fuit, & per conſiderationem Cur' dicti patris priſonæ adjudicata per biennium ibidem moratura, & etiam tempus impriſonamenti quod adhuc reſtat de biennio prædicto. Ideo vult idem Rex quod præfata Goditha * de eo quod ad ipſum pertinet pro tranſgreſſione prædicta ſit quieta, & quòd à priſona prædicta, ſi pro eo quod ad ipſum regem inde pertinet, & non alia de cauſa detineatur in eadem, deliberetur. Teſte Rege apud Weſtm' 8. die Maii anno regni ſui primo. Ideo ipſa Goditha inde quieta quoad hoc, quod ad dominum regem inde pertinet, &c.

W.2.ca.35. Anno 13 E.1. Paſch 34 E.1. Corã Rege Rot. 30 Kanc. in Raviſhment de gard. See the Firſt part of the Inſtitutes. W.2.ca 35. * Nota de eo quod ad regem pertinet. Anno 1 E.2.

See more of this matter, 3 El. Dier 201, 202. 9 El. Dier 261, Muſgraves caſe. 16 El. Dier 323, Taverners caſe.

The Defendant in an Appeal of murder upon not guilty pleaded, was found guilty of manſlaughter: and it was reſolved by the Juſtices upon conference between them, that the Queen might pardon the burning of the hand, for that is no part of the judgement at the ſuit of the party Plaintif in the appeal, but it is a collaterall, and exemplary puniſhment inflicted by the ſtatute of 4 H.7. cap. 13.

Trin. 40 El. Corã Rege in appeal de murdro. Inter Shugborough & Buggins. Li.5.fo.50.& 110. b. 15 H.7.9. 4 H.7.ca.13.

In ſome actions wherein the ſubject is ſole party (as appeareth by that which hath been ſaid) ſome things the King may pardon: ſo on the other ſide, where the King is ſole party, yet ſome things there be, that he cannot pardon. As for example; For all common nuſances, as for not repairing of bridges, high-ways, &c. the ſuit (for avoiding of multiplicity of ſuits, which the laws abhorre, and that nulli magis tueri rempublicam creditum eſt quam regi) is given to the King only, for redreſſe, and reformation thereof, but the King cannot pardon, or diſcharge either the nuſance, or the ſuit for the ſame; for, as Bracton ſaith, Non poterit Rex gratiam facere cum injuria & damno aliorum. See Glanvill li.7. cap.17. verſ. finem.

3 E.3.Aſſ.445. 16 E.3.Grant.53. 35 H.6.29.per Forteſcue. 37 H.6.4.b. Pl.Com.487. in Nichols caſe.

4 E.4.fo.4.12. The Cuſtomer albeit the bond and ſurety be made to him for the importing of Bullion according to the ſtatute of 14 E.3. cap.1. yet cannot he releaſe it, quia pro bono publico. If one be bound in a recogniſance, &c. to the King to keep the peace againſt another by name, and generally all other Lieges of the King; In this caſe, before the peace be broken, the King cannot pardon or releaſe the recognizanae, although it be made onely to him, becauſe it is for the benefit and ſafety of his ſubjects.

11 H.4.43.
37 H.6.4.b.
1 H.7.10.b.

1 H.7.3.
37 H.6.4.
See before ca.88. Againſt vexatious Relators, &c. in fine.
* 3 H.8.c.12.&c. After an action popular be brought, tam pro domino Rege, quàm pro ſeipſo, according to any ſtatute, the King cannot diſcharge but his own part, and cannot diſcharge the Informers part, becauſe by the bringing of the action he hath an intereſt therein: but before action brought, the King may diſcharge the whole, (* unleſſe it be provided to the contrary by the Act) becauſe the Informer cannot bring an action or information originally for his part only, but muſt purſue the ſtatute: and if the action be given to the party grieved, the King cannot diſcharge the ſame.

Lib.5.fo.50. Buggins caſe. Bodem li.fo.51. Hals caſe. All ſuits in the Starchamber, though exhibited by the party, are Informations for the King, and the King may pardon them, but after judgement (and dammages, if any be given) and coſts tared, the King cannot pardon them.

a Prov.20.28. Miſericordia & veritas cuſtodiunt regem. [a] And that party which informeth not the King truly, is not worthy of his grace and forgiveneſſe, and therefore either Suppreſſio veri, or expreſſio falſi doth avoid the pardon.

b 9 E.4.28. 19 E.3.Cor.124. 6 E.4.4. per Cheke. 11 H.4.16. [b] A man commits felony, and is attainted thereof, or is abjured for the ſame, the King pardoneth him the felony without any mention of the attainder, or abjuration, the pardon is void. c Lib.6.fo.13. But if a man be attainted of burglary, and by the generall pardon all felonies, &c. are pardoned (except all burglaries) the attainder and burglary be excepted, as before is ſaid.

F.N.B.225.c. The King pardoneth to A. a felony whereof he ſtandeth indicted, or indicted and attainted, &c. and in truth he is not indicted, nor attainted, &c. this is expreſſio falſi, and maketh the pardon void. A. is outlawed, and the King pardons him the outlawry, and all his goods; it is void for the goods, for he muſt have a grant of them.

9 H.5.14,15. If a man be indicted of felony, and the King reciteth the ſame, and pardoneth the felony contained in the indictment, and all outlawries thereupon, if any be, this is a good pardon of the outlawry, though it be doubtfully alledged, and the King not certainly informed.

F.N.B.269. 20 El.Dier 135. Li.6.fo.13,14. Li.5.fo.51. Hals caſe. Regiſt.67. The King may pardon one convict of hereſie, or of any other offence puniſhable by the Eccleſiaſticall law. In all proceedings in the Eccleſiaſticall Court ex officio, the King may pardon the offence. The King may alſo pardon Piracy upon the ſea; but by what word, and in what manner, ſee before in the Chapter of Piracy.

Mic. 37 & 40 El. Reſolution of the Juſtices concerning Pardons and Licences of Alienation and the pleading of them, &c. All the Juſtices of England being aſſembled at Serjeants Inne in Fleetſtreet, when I ſerved Queen Eliz. as her Attorney generall, I moved this caſe unto them. A man ſeiſed in fee of two mannors, the one holden of the Queen by Knight ſervice in Capite, and the other holden of a common perſon, alieneth both, and the Alienee ſueth out a pardon for both, in which pardon the words are, quæ de nobis tenentur in capite per ſervic' militare, ut dicitur, and after this pardon being tranſcripted into the Exchequer, proceſſe goeth out againſt the Alienee, who pleadeth the pardon, beginning his plea thus, Quibus lectis & auditis idem A. queritur ſe coloſe præmiſſorum graviter vexatum & inquietat' fore, & hoc minus juſte; quia dicit quod eadem domina regina per Literas ſuas Patentes, &c. and plead the Letters Patents of pardon, as they be with the ſaid clauſe of ut dicitur, and after he alieneth the mannor which in rei veritate was not holden: The queſtion was, whether the ſecond Alienee may plead the truth of the matter or ought to be concluded by the pardon and plea of the firſt Alienee. And firſt the Juſtices had conſideration of the books in 29 Aſſ. pl.38. 46 E.3.33. Pl. Com. 398. 7 E.6. Tit. Eſtoppel. Br.222. And in the end it was reſolved by all the Juſtices, that the pleading of the pardon or

29 Aſſ.pl.38. 46 E.3.33. Pl.Com.398. 7 E.6.Tit Eſtop. Br.222.

of

of a license, as it is, is no conclusion for no more then the pardon or license being not positive or affirmative, but (ut dicitur) is a conclusion; no more is the pleading of them with the clause of (ut dicitur) any conclusion. And conclusions shall not be wrought by inference or implication of a thing that is not directly alledged. But if the pardon or license had been affirmative and direct without the clause, ut dicitur, it had been a conclusion, and so had the pleading thereof been also. Lastly, it was resolved, that in case of the pardon or license with the clause, ut dicitur; if the party confesse the tenure that plead the same; as to say, Bene & verum est, that the land is holden by Knights service in Capite, and plead the pardon or license, this shall conclude: and some of the Barons said, that according to these resolutions it hath been used in the Exchequer, and many presidents be there accordingly: and by these resolutions the Books abovesaid shall the better be understood.

If the King release to A all debts, and in truth A and B be indebted, this shall not discharge B: but otherwise it is in the case of a subject, for in that case the release to one dischargeth both. 34 H.6 3. 21 E.4.46. 2 R.3.4. lib.5. fo.56.

If one be indebted to the King, if the King pardon or release the debt, the action and suit for the debt is discharged, and if he pardon or release the action and suit, the debt is discharged: and so it is in both these cases in the case of a Subject.

A man is indicted of trespasse and outlawed at the suit of the King. Rex pardonavit utlegariam in eum promulgat', & quicquid ad eum pertinet, and notwithstanding the defendant shall make fine, for it seemeth that these words, quicquid ad eum pertinet, without any reference, are too generall to dispence with the fine. 22 Ass.pl.37.

We finde also a discharge of further proceeding directed to the Judges of the Court, &c. (not by any pardon of the offence) but by the Kings acknowledgement under the Great Seale of the parties innocency, with commandement to the Judges, that in the former proceedings and Proces, &c. they shall altogether surcease: whereupon the Court will award that the party shall go sine die, and that there shall be no further proceeding against him: As taking one example for many. William de Melton Archbishop of Yorke was accused in the Kings Bench coram Rege & concilio suo, in Anno 3 E. 3. for adherency to Edmond Earle of Kent in his treasons, whereunto the Archbishop pleaded not guilty; and after two Writs of Venire fac. awarded, the King directed his Writ under the Great Seal to the Judges of the Kings Bench, to this effect. Licet venerabilis pater Willielmus Archiepiscopus Eborum, & Stephanus London Episcopus, per diversa bria nostra coram nobis ad sectam nostram implacitentur de eo quod ipsi Edmundo nuper comiti Kantiæ adhæsisse debuerant: Quia tamen prædict. Archiepiscopus & Episcopus de adhæsione prædict. omnino immunes reputamus: Vobis mandamus, quod placitis prædictis coram nobis ulterius tenen' omnino supersedeatis. Teste me ipso apud Westm. 12 die Decembr. Anno Regni nostri 4. The award of the Court that is given thereupon, is very observable, *viz.* Cujus brevis prætextu, consideratum est, quod prædict. Archiepiscopus eat inde sine die, &c. Et ulterius non procedatur versus eum. Pasch.4 E.3.coram Rege.Rot. 38.

Stephen Gravesend Bishop of London was charged with the same offence in Parliament, Anno 3 E.3. whence by order of Parliament the matter was referred to the Kings Bench to be tried, where he pleaded not guilty, & after was discharged *ut supra*, by the same Writ. These men (it may be) thought that the taking of the pardon should be an implyed confession of the fault, & therefore went a new way: but no man that is wise and well advised will refuse God and the Kings pardon how often so ever he may have it; for there is no man but offendeth God and the King almost every day, and the pardon is the safest and surest way. Pasch.4 E.3.coram Rege. Rot. 53.

If a man be indicted of felony, and found guilty and being in prison the King may under the Great Seale reciting the offence, &c. retain him to serve in his wars on this side or beyond the seas: this Charter he may plead, and the Court ought to allow it. As for example: Quidam indictatus de felonia, & inde culp. dicit quòd Rex eum conduxit, & inde producit cartam, quòd Rex eum conduxit Pasch.22 E.3.tit. cor.239.coram Rege.

duxit in Vaſc. in exercitu, & dicta carta allocata fuit per curiam. But a Protection lyeth not in that caſe: becauſe a Protection is a formed Writ, and cannot have ſuch a recitall of the truth of the caſe: and [a] Writs of Protection lye not in caſe of Felony, nor is it to be allowed to any that is priſoner to the Court.

[b] One indicted of felony, without any learned Counſell, ſhewed forth a Charter of pardon which was diſcordant to the Indictment, and alſo to his name; and becauſe the Court perceived that it was the Kings meaning he ſhould be pardoned, he was remanded to get a better pardon.

[c] What things be requiſite to a pardon of outlawry, ſee the ſtatute of 5 E.3. cap.12.

[d] When the parties defendants appeared to the Court to be poore, and were to be amerced or fined, the Entry of ancient time was, Perdonantur per Juſtic, quia pauperes.

[e] It is obſerved that Repeals by Parliament of Pardons lawfully and duly obtained, have been ſeeds of great diſcontentment, and of evill event.

[f] General Pardons have been often granted at the Petition of the Commons, for they know beſt, where the ſhooe wringeth them, and wherein, and how they are to be eaſed.

So odious was perjury, that by the law of God it was not to be pardoned: Non miſereberis ejus, &c.

[a] 7 E.4.29.a acc' 30 H.6.3. See the firſt part of the Inſtitutes. Sect.199.

[b] 26 Aſſ. p.46.

[c] 5 E.3.cap.12.

[d] Paſc.8 E.1. in banco Rot.79. Abbas de Burton, &c.

[e] Vid. Rot. Parl. 21 R.2.nu.12,13. &c.

[f] 36 E.3.ca.ult. 4 R.2.nu.30,31, 32. 1 H.4.ca.20. 2 H.4.ca.13. 5 H.4.ca.15. 4 H.5.cap.8. a ſhort and effectuall pardon, and many others. Deut.9.21.

CAP. CVI.

Of Reſtitutions.

THere is another worke of grace and mercy, that is, when any man or woman being attainted of High Treaſon, Petit Treaſon, or Felony, (whereby the blood is corrupted, &c.) or his or her heir is reſtored.

And ſeeing we have formerly ſpoken how far, and to what intent in thoſe caſes, the King of his grace may by his Charter of Pardon reſtore the party: we ſhall now treat of the reſtitution of the Delinquent, or of his or her Heirs by Parliament. Attainders ought to be had upon plain and direct evidence, (as before is ſaid) for if the party be executed, reſtitution may be had of his lands, &c. but not of his life. Generally, Reſtituere nihil aliud eſt, quam *in priſtinum ſtatum reducere.

See the firſt part of the Inſtitutes, Sect. 1. fo.8. a. & 646,647.745. Vid.cap.pardon. fol.233.

*Gen.40.13. Job 12.23.42.10.

Reſtitutio ſecundum quid, ſeu in partem.

Reſtitutio in integrum.

Of reſtitutions by Parliament ſome be in blood only, (that is to make his reſort as heir in blood to the party attainted and other his anceſtors, and not to any dignity, inheritance of lands, &c.) and this is a reſtitution ſecundum quid, or in part. And ſome be generall reſtitutions, to blood, honours, dignities, inheritance, and all that was loſt by the attainder: and that is reſtitutio in integrum, with an addition ſometimes, that it ſhall be lawfull for the party reſtored and his heirs, to enter, &c. Of the firſt you may reade in Dier 10 Eliz. fo.274. in Petition; and Rot.Par.23 Eliz. of the Earl of Arundel, &c. Of the ſecond you may reade 15 E.3. tit. Petition 2. 3 H.7. fo. 15.a. 10 H.7. 22,23. pl. com. fo.175. Rot.Par. 13 H.4.nu.20.&c. Of both of them you may reade plentifully in our Books, and Parliament Rolls, and in divers of them with addition of Entry. See 1 H.8. Kelw.154. Sir William Oldehalls caſe. 4 H.7.7. Lo. Ormonds caſe. Rot. Parl. 11 H.4.nu.42. Rich. de Haſtings caſe, and Rot.Parl. 14 E.4. nu.4. Sir Joh. Forteſcues caſe, attainted of treaſon in 1 E.4. &c.

Brit.ca.13.fo.23. 10 Eliz.Dier 274.

3 E.6.tit. Reſtitution.Br.37.

And the reaſon wherefore the King may by his Charter pardon the execution, and reſtore the party or his Heirs to the lands forfeited by the attainder, and remaining in the Crown is, for that no perſon hath thereby any prejudice; but to make

make reſtitution of his blood he cannot do it, but by Act of Parliament, becauſe it ſhould be to the prejudice of others.

In cartis benigna facienda eſt interpretatio, in fundationibus domuũ religioſarum, hoſpitalium, & aliorum operum charitatis benignior, in teſtamentis magis benigna, in reſtitutionibus benigniſſima. [a] For it is holden in our Books, that in reſtitutions the King himſelf hath no favour, nor his Prerogative any exemption, but the party reſtored is favoured.

[b] King H. 3. was intitled, &c. to the lands of William de Albo Monaſterio by his attainder, and granted the ſame to Robert de Mares and his Heirs, donec eas reddiderit rectis hæredibus per voluntatem ſuam, vel per pacem. And albeit at the making of this grant William de Albo Monaſterio (being dead) could have in reſpect of the attainder and corruption of blood no right Heir; yet becauſe it was to make reſtitution, it had a moſt benigne interpretation.

[c] William Lo. Zouche of Mortimer and Elianor his wife prayen to be reſtored to their land of Glannor and Morgannon in Wales, the Mannor of Haveley in the County of Worceſter, the Mannor of Teukesbury in the County of Gloceſter, being the inheritance of the ſaid Elianor: who by the extort means of Roger late Earle of March, were inforced to paſſe the ſame to the King by fine, in conſideration of ten thouſand pounds the King reſtored them thereto as in their former eſtate.

* Henry Courtney Marquiſſe of Exeter and Earl of Devon, having iſſue Edward Courtney, his only ſonne, was attainted of High Treaſon by the courſe of the Common law in Anno 31 H. 8. and in the ſame year was alſo attainted by Act of Parliament. Queen Mary by her Letters Patents bearing date 18 Sept. Anno 1 Regni ſui granted the Mannors of P and O, &c. in the County of Devon, &c. to the ſaid Edward Courtney and his heirs: and afterwards 5 Octobris in the ſame year, at a Parliament then holden, the ſaid Edward and his heirs were from thenceforth by authority of that Act reſtored and inabled only in blood, as well as ſonne and heir of the ſaid Lord Marquiſſe his Father, as to all and every other collaterall and lineall anceſtor and anceſtors of the ſaid Edward. And that the ſeverall attainders againſt the ſaid Lord Marquiſſe for the attainder of the ſaid Lord Marquiſſe be not in any wiſe prejudiciall or hurtfull to the ſaid Edward or his heirs for the corruption of the blood only of the ſaid Edward, but that the ſeverall attainders and either of them be againſt him and his Heirs for the corruption of blood only, utterly void. Provided alwayes that the ſaid Act, ne any thing therein contained, ſhould not in any wiſe extend to give any benefit or advantage to the ſaid Edward, ne to his heirs, to demand, claime, or challenge any Honors, Caſtles, &c. ne any other hereditaments whatſoever whereunto H. 8. and E. 6. or either of them was entituled, or ought to have and enjoy by reaſon of the ſaid ſeverall attainders of the ſaid late Lord Marquiſſe, or of either of them. Edward Courtney died ſeiſed of the ſaid Mannors without iſſue, 18 Septemb. Annis 3 & 4 Ph. & Mar. and Reinold Mohun, Alexander Arundell, John Vinian the younger, John Trelawny Eſq; and Margaret Buller Widow, were his collaterall Couſins and Heirs: and whether the ſaid reſtitution extended to the Heirs collaterall of the ſaid Edward, was by the Queens commandment referred to the conſideration of the two Chief Juſtices Popham and Anderſon, Peryam Chief Baron, and to Egerton Attorny, and to the Solicitor Generall. And it was reſolved, that by reaſon of the attainder of the Lord Marquiſſe, if there had been no Act of reſtitution, the heirs collaterall of the ſaid Edward could not have inherited to the ſaid Edward, in reſpect of the corruption of the blood wrought by the ſaid attainder only: hereupon it was objected, that when it was enacted by the ſaid Act of reſtitution, that the ſaid Edward and his heirs ſhould be reſtored and inabled in blood only as ſonne and heir to his ſaid father, as all his anceſtors lineall and collaterall, that the ſaid reſtitution extended only to his heirs lineall, for other heirs he could not have as long as the ſad attainders of the Marquiſſe ſtood in force, and the words of the Act of Reſtitution to Edward and his heirs, might be ſatisfied with the heirs lineall. And upon due conſideration

See the firſt part of the Inſtitutes, Sect. 646, 647. 745. fo. 392. verb. *Le ſank eſt corrupt, &c.*

a See 10 El. Dier ubi ſup. 41 E. 3. 5. b. 27 Aſſ. p. 48. 17 E. 3. 40. 5 E. 3. 66. 29 E. 3. 7. 20 Eliz. Dier 360 Pl. Com. 252. a. 16 E. 3. Livery 30 44 E. 3. 45. 18 E. 3. 21, 22. 24 E. 3. 29. 40 E. 3. grant. 50.

b Mich. 8 E. 1. in Banco. Rot. 62. Norff.

Rot. Par. Anno 4 E. 3. nu. 18. on the backſide of the Roll.

* An example of reſtitution in blood only. 11 H. 4. nu. 42. 13 H. 4. nu. 19, 20.

Mic. 35 & 36 El.

conſideration had of the caſe, it was (una voce) reſolved by them all, that corruption of blood is a diſtinct penalty inflicted by law; and that the ſaid Act of reſtitution did extend to the heirs collaterall of the ſaid Edward, (having no heirs lineall) as to the cleering and reſtoring of the blood, and avoiding of the corruption thereof: and that it had been ſufficient if the Act had reſtored and enabled him in blood only as heir to his father, thereby he and his heirs, as well collaterall as lineall, might make their deſcent, or reſort from the Marquiſſe (for there was the ſtop and corruption) and from all other the anceſtors of the ſaid Edward, lineall or collaterall, and ex abundanti the other clauſe alſo is added, for the more manifeſtation hereof.

Margaret Plantagenet was Daughter to George Duke of Clarence attainted of High Treaſon by Act of Parliament 17 E. 4. and Siſter of Edward Earl of Warwick, only ſonne of the ſaid George, and Iſabel eldeſt Daughter of Richard Nevil Earle of Warwick and Salisbury: which Edward was attainted of High Treaſon in Anno 15 H. 7. before John Earle of Oxford then being High Steward of England. The ſaid Margaret was by Act of Parliament Anno 5 H. 8. reſtored to the ſtyle, ſtate, name, title, honour, and dignity of the Counteſſe of Salisbury, (ſhe was the laſt of the ſirname of Plantagenet) which Act is very well penned, and worthy the reading for many reſpects, and the Preamble thereof, inter alia.

Statute de 5 H.8 not in print.

14 R.2.nu.36. *a* Rot.par.18 E.1 nu.11. of Liberties.

Bils of reſtitution may begin in the Parliament, either in the Houſe of Commons, or in the Lords Houſe.

[a] There be alſo other kinds of Reſtitutions to be treated of amongſt the Pleas of the Crown, as Reſtitution of goods upon an Appeal, whereof you ſhall reade in Stanford with this addition. Vide lib. 5. fo. 110. a. 21 E. 4. 10.

Stanf.pl.cor. fo. 165.166,167. 186.66.105.107. F.N.B.66.a. *b* 21 H.8.cap.11. 22 E.3.cor.460.

[b] And by the Statute of 21 H. 8. cap. 11. Reſtitution is to be granted upon an Indictment, &c. For by the Common law the party ſhould not be reſtored to his goods upon an Indictment (becauſe it is the ſuit of the King) albeit the enqueſt found that the party had made freſh ſuit. But reſtitution was to be made upon an Appeal which is the ſuit of the party.

Stanf.167.a.b. Lib.5.fo.110. Lib.6.fo.80.

See Stanford alſo fo. 167. a. b. whereunto you may adde Lib. 5. fo. 110. a. & lib. 6. fo. 80. where you ſhall finde, that though this Statute of 21 H. 8. ſpeak only of the party robbed, yet his executors are within the ſtatute, and ſo are his Adminiſtrators. For it is a beneficiall law, and giveth a more ſpeedy remedy to the party robbed, &c. then the Common law gave by way of appeale, and therefore ought to be conſtrued beneficially.

F.N.B.66.a. 8 E.2 tit.forfeiture 34. 3 E.3.cor.365. Vid.40 E.3.42. Lib.5. fo.110. Hoſtons caſe.

Vide the Regiſter 68.b. that in ſome caſes when the King ought ex merito juſticiæ to make reſtitution to the party: yet for the honour of the King the Writ ſaith, ſine dilatione reſtituas de gratia noſtra ſpeciali, which derogate nothing from the right of the Subject, when right is accompanied with grace.

c 8 H.6.cap.9. See the ſecond part of the Inſtit. cap.8.H.6.cap.9. *d* 31 Eliz.cap.11. Vide 4 Mariæ, *e* Dier 141.

Laſtly, there are other lawes concerning Reſtitutions of another kind. [c] As by the ſtatute of 8 H. 6. reſtitution is to be made, when he that hath an eſtate of inheritance or freehold is diſſeiſed by forcible entry or forcible deteyner. [d] By the ſtatute of 31 Eliz. there ſhall be no reſtitution by the ſtatute of 8 H. 6. upon an indictment of forcible entry or forcible deteyner, where the defendant hath been three whole years together before the day of ſuch indictment [e] in quiet poſſeſſion, and his eſtate not ended, according to the true meaning of a Proviſo in the ſaid Statute of 8 H. 6. as it is declared by the ſaid Act of 31 Elizabeth.

21 Jac.cap.15. By the ſtatute of 8 H.6. cap.9.

By the ſtatute of 21 Jac. Regis, ſuch Judges, Juſtices, or Juſtice, as are enabled to give reſtitution of poſſeſſion unto tenants of any eſtate * of freehold, &c. ſhall by reaſon of this Act of 21 Jac. have the like and the ſame authority upon indictment of ſuch forcible entries or forcible with-holdings before them duly found, to give like poſſeſſion unto tenant for yeares, tenant by copie of Court Roll, guardens by Knights ſervice, tenants by Elegit, Statute Merchant, or by ſtatute Staple,

And

And for as much (as it hath been ſaid) no reſtitution ought to be made where the defendant or party indicted in caſe of freehold hath been in poſſeſſion by the ſpace of three whole years, &c. they having the like and ſame authority in caſe of tenant for years, tenant by copie of Court Roll, and other the tenants above named, cannot give reſtitution or poſſeſſion, where the party indicted hath been in quiet poſſeſſion by the ſpace of three whole years. Nota, this Act of 21 Jac. extends not to a Garden in Soccage, nor to a Garden or Keeper of a Park: neither (as ſome hold) doth it extend to him, that by a laſt Will hath an intereſt in lands or tenements untill debts and legacies be paid, becauſe certain tenants be particularly nominated, and this is caſus omiſſus. But this being a beneficiall law to reſtore him, that right hath, to his poſſeſſion of lands, &c. whereof he was wrongfully by force diſpoſſeſt, or by force withholden, &c. and being in like caſe and equall miſchief, others do hold, that this Act extendeth to this caſe of ſuch a deviſee, &c. and ſo it is for a tenant for a year, or for an halfe, or three quarters of a year.

See the ſtatute of 32 H. 8. cap. 3. where the particular tenant charged with more then the land is worth, may after his term expired hold over untill he be ſatisfied, &c. in equall caſe with ſuch a deviſee.

* Nota, there be divers preſidents in the Chancery for reſtitution by Writ to be made after execution upon a Statute ſtaple.

* Reſtitution of another kinde, whereof we remember no Book caſe.

Anno 25 H. 6. Execution was ſued upon a Statute ſtaple, and for that no certificat of the ſtatute, &c. appeared of Record, the Conuſor had a Writ of Superſedeas out of the Chancery with reſtitution to be made; and the forme of this Writ appeareth in a Regiſter M. S. in the Chancery.

In the caſe of Sir Robert Gardner in the time of Sir Thomas Bromley Lord Chancellor, after a Superſedeas granted, execution was done upon a Statute ſtaple, whereupon a Superſedeas was granted with reſtitution reciting the ſpeciall matter.

There is another preſident in 33 Eliz. in the caſe of one Carrant, (but there the Writ recited no ſpeciall cauſe, but pro diverſis cauſis & conſiderationibus,) a Superſedeas with reſtitution was awarded.

FINIS.

THE EPILOGVE.

THus have we by the great goodneſſe of Almighty God, *Per varios caſus, per tot diſcrimina rerum*, brought this work concerning High treaſon, and other *Pleas of the Crowne*, or Criminall cauſes, and of Pardons, and Reſtitutions to a concluſion; wherein (as we are verily perſwaded) we have made it apparent from the lively voice of the laws themſelves, that no Country in the Chriſtian world have in criminall caſes, of higheſt nature, laws of ſuch expreſſe and defined certainty, and ſo equall between the King and all his ſubjects, as this famous kingdome of England hath, being rightly underſtood, and duly executed, to the great honour of the King, and of the Laws, and the happy ſafety of all his loving and loyall ſubjects.

Now ſeeing *Iuſtitia eſt duplex*, viz. *ſeverè puniens, & verè præveniens*; that is, Iuſtice ſeverely puniſhing, whereof we have ſpoken, and truly preventing, or preventing juſtice, (*quæ adhuc deſideratur*) for we have ſpoken onely of the former; wee will therefore at this place (for a concluſion) point at the other with a direction how it may be effected. Juſtice divided.

True it is, that we have found by wofull experience, that it is not frequent and often puniſhment that doth prevent like offences, *Melior eſt enim Iuſtitia verè præveniens, quam ſeverè puniens*, agreeing with the rule of the Phyſitian for the ſafety of the body, *Præſtat cautela, quam medela*: and it is a certain rule, that *Videbis ea ſæpe committi, quæ ſæpe vindicantur*; Thoſe offences are often committed, that are often puniſhed: for the frequency of the puniſhment makes it ſo familiar as it is not feared. For example, what a lamentable caſe it is to ſee ſo many Chriſtian men and women ſtrangled on that curſed tree of the gallows, inſomuch as if in a large field a man might ſee together all the Chriſtians, that but in one year, throughout England, come to that untimely and ignominious death, if there were any ſpark of grace, or charity in him, it would make his heart to bleed for pity and compaſſion. (But here I leave to Divines to inform the inward man, who being well informed, *verbo informante*, the outward man will be the eaſilier reformed, *virga reformante*.) *Regula.* *Sta, perlege, plora.* Seneca li. 1. De Clem. cap. 24. *Non minus principi turpia ſunt multa ſupplicia, quam medico multa funera.* *Regula.* *Non morbus pleriſque, ſed morbi neglecti curatio corpus interficit.*

This preventing Iuſtice conſiſteth in three things. Firſt, in the good education of youth, and that both by good inſtruction of them in the grounds of the true religion of Almighty God, and by learning ſome knowledge or trade in their tender years, ſo as there ſhould not be an idle perſon, or a * begger, but that every childe, male * Deut. 15. 4. *Non erit omnino indigens & mendicus inter vos, ut benedicat tibi Dominus.*

male or female, whoſe parents are poor, might at the age of ſeven years earn their own living: for *Ars ſit quod à teneris primum conjungitur annis:* and this, for the time to come, would undoubtedly by preventing Iuſtice avoid idleneſſe in all, (one of the foul and fatall channels that lead into *mare mortuum*) and by honeſt trades cauſe them to become good members in the Common-wealth.

Otioſus nihil cogitat niſi de ventre, & venere.

Secondly, in the execution of good laws: True it is that there be good laws already to puniſh idleneſſe, but none of ſufficient force or effect to ſet youth, or the idle on work.

Thirdly, that foraſmuch as many doe offend in hope of pardon, that Pardons be very rarely granted, for the reaſons in the Chapter of Pardons expreſſed.

See before Ca. of Pardons fo. 236.

But the conſideration of this preventing Iuſtice were worthy of the wiſdome of a Parliament, and in the mean time expert and wiſe men to make preparation for the ſame, as the Text ſaith, *ut benedicat eis Dominus.* Bleſſed ſhall he be that layeth the firſt ſtone of this building, more bleſſed that proceeds in it, moſt of all that finiſheth it, to the glory of God, and the honour of our King and Nation.

Pſal. 58. 11. *Miſericordia Domini prævenier me.* 1 Maccab. 6. 27. *Niſi prævenieris illis, majora quam hæc facient, & non poteris eos obtinere.*

3 & 4 E. 6. ca. 5. in the Preamble. *Imprimis intereſt reipublicæ, ut pax in regno conſervetur, & quæcunque paci adverſetur, provide declinentur.* 1 Mar. cap. 12. 32 H. 8. ca. 9. See the Fourth part of the Inſtitutes, fo. 312. b.

Et pergrata Deus nobis hæc otia fecit,
Optimus eſt patriæ jura referre labor.

Deo gloria, & gratia.

FINIS.

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